No. 14-1280

Title:	Jeffrey J. Heffernan, Petitioner
	v.
	City of Paterson, New Jersey, et al.
Docketed:	April 24, 2015
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Nos.:	(14-1610)
Decision Date:	January 22, 2015
Rehearing Denied:	February 13, 2015

Questions Presented

—Date—	——Proceedings and Orders----------
Apr 22 2015	Petition for a writ of certiorari filed. (Response due May 26, 2015)
May 22 2015	Order extending time to file response to petition to and including June 25, 2015.
May 28, 2015	Waiver of right of respondent Police Chief James Wittig to respond filed.
Jun 25 2015	Brief of respondents City of Paterson, New Jersey, et al. in opposition filed.
Jul 7 2015	Reply of petitioner Jeffrey J. Heffernan filed.
Jul 15 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Petition GRANTED.
Nov 2 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Nov 12 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioner.
Nov 16 2015	Joint appendix filed. (Statement of costs filed)
Nov 16 2015	Brief of petitioner Jeffrey J. Heffernan filed.
Nov 20 2015	Brief amicus curiae of National Association of Government Employees filed.
Nov 23 2015	Brief amicus curiae of United States filed.
Nov 23 2015	Brief amicus curiae of The Becket Fund for Religious Liberty filed.
Nov 23 2015	Brief amici curiae of Thomas Jefferson Center for the Protection of Free Expression, et al. filed.
Nov 24 2015	SET FOR ARGUMENT on Tuesday, January 19, 2016
Dec 4 2015	Record requested from U.S.C.A. 3rd Circuit.
Dec 15 2015	CIRCULATED.
Dec 16 2015	Brief of respondents City of Paterson, New Jersey, et al. filed. (Distributed)
Dec 21 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 21 2015	Record from the U.S.C.A. 3rd Circuit is electronic.
Dec 21 2015	The record from the U.S.D.C. District of New Jersey (Newark) is electronic and located on PACER.
Dec 23 2015	Brief amicus curiae of New Jersey State League of Municipalities filed. (Distributed)

Dec 23 2015	Brief amici curiae of National Conference of State Legislatures, et al. filed. (Distributed)
Jan 5 2016	Reply of petitioner Jeffrey J. Heffernan filed. (Distributed)
Jan 8 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 19 2016	Argued. For petitioner: Mark Frost, Philadelphia, Pa.; and Ginger D. Anders, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae). For respondents: Thomas C. Goldstein, Bethesda, Md.
Apr 26 2016	Judgment REVERSED and case REMANDED. Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Alito, J., joined.
May 31 2016	JUDGMENT ISSUED

14-1280

No. 14-

Supreme Court, U.S.
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In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v

CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTIG, and POLICE DIRECTOR MICHAEL WALKER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment bars the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate.

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey J. Heffernan respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Third Circuit is reported at 777 F.3d 147 (3d Cir. 2015). App. 1a. The opinion of the U.S. District Court for the District of New Jersey is reported at 2 F. Supp. 3d 563 (D.N.J. 2014). App. 14a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Third Circuit was entered on January 22, 2015. The Court of Appeals denied a timely petition for rehearing en banc on February 13, 2015. App. 72a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

The circuits are split 3-1 on a basic First Amendment question. Nonpolitical public employees such as police officers cannot be demoted for supporting a candidate in an election. But what if a public em-

ployee is demoted because his supervisor *mistakenly* believes he supports a candidate? Before this case, the Courts of Appeals unanimously held that the supervisor's mistake does not allow him to demote the employee. All three circuits that had addressed the question had concluded that a demotion based on the employee's *perceived* political association is just as contrary to the First Amendment as a demotion based on the employee's *actual* political association.

In this case, the Third Circuit has taken the opposite view. In the Third Circuit, a supervisor is now free to demote or even fire a public employee based on the supervisor's perception of the employee's political affiliation, so long as the supervisor's perception is incorrect.

The Third Circuit's view has chilling implications. Because of the decision below, public employees in the Third Circuit now have reason to fear taking any action that might cause them to be perceived—even incorrectly—as favoring a candidate or a political party. Any stray comment that gives the boss the wrong impression can be grounds for discharge. And the Third Circuit's view makes no practical sense. It rewards the careless supervisor, who is free to make kneejerk personnel decisions based on political considerations that would be off-limits to a supervisor who is careful to ascertain the facts before acting. When the government is wrong as a constitutional matter, it should not be off the hook because it also happens to be wrong as a factual matter. Two wrongs do not make a right.

The majority view among the Courts of Appeals is the correct one. When a public employee is demoted because his supervisor mistakenly believes the employee has taken sides in an election, the supervisor's motivation is just as illicit, and the damage to the employee just as great, as if the supervisor's perception was accurate.

1. Petitioner Jeffrey Heffernan has been a police officer with the Paterson, New Jersey, Police Department since 1985. By 2006 he worked as a detective in the office of Police Chief James Wittig. App. 2a.

Paterson held a mayoral election in 2006. The candidates were Jose Torres, the incumbent mayor, and Lawrence Spagnola, a former Paterson police chief. Heffernan was close friends with Spagnola, but he did not work on Spagnola's campaign, and he could not vote for Spagnola because he did not live in Paterson. Heffernan's supervisors in the Police Department, who supported Torres, knew about Heffernan's friendship with Spagnola. App. 3a.

Shortly before the election, Heffernan's bedridden mother asked him to drive into Paterson to obtain for her a large Spagnola campaign yard sign, to replace a smaller sign that had been stolen from her yard. Early in the afternoon, while he was off duty, Heffernan drove to a distribution point where campaign workers were giving out signs. Assembled were Spagnola supporters and Spagnola's campaign manager, Paterson City Councilmember Aslon Goow. Heffernan spoke briefly with Goow and took a campaign sign, which he delivered to his mother's house.

Arsenio Sanchez, a Paterson police officer assigned to Mayor Torres's security staff, happened to be driving by and saw Heffernan speaking with Goow and holding the sign. Sanchez immediately called Chief Wittig. Soon after, Mayor Torres also knew about Heffernan's activity. The very next day, Heffernan was demoted from detective to patrol officer, removed from the police chief's office, and assigned to a walking patrol post, as a punishment. His supervisors told him he was being transferred because of his support for Spagnola. In fact, Wittig himself admitted that he transferred Heffernan due to Heffernan's "overt[] involvement in a political election." App. 3a.

A few months later, Heffernan filed this § 1983 suit for retaliatory demotion in violation of his freedom of speech and of association. App. 3a.

2. A jury found in Heffernan's favor on the freedom of association claim. The jury awarded compensatory damages of $75,000—$37,500 each from Chief Wittig and Mayor Torres—and an additional $30,000 in punitive damages, half from Wittig and half from Torres. App. 4a, 18a. After trial, however, the District Judge retroactively recused himself based on what he believed to be a conflict of interest. App. 4a. The verdict was vacated and the case was reassigned to a different judge, who granted summary judgment for the respondents. App. 66a. That decision was reversed by the Third Circuit. App. 57a. On remand, the case was reassigned to yet another District Judge. There was a new round of briefing on the parties' cross-motions for summary judgment. App. 21a.

3. The District Court granted the respondents' motion for summary judgment. App. 14a-54a.

The District Court held that Heffernan had no cause of action based on his *actual* speech or association, because he had not actually campaigned for Spagnola. App. 24a-33a, 43a-45a. The District Court also held that Heffernan could not state a cause of action based on his supervisors' incorrect perception of his *speech*, because Third Circuit precedent did not allow recovery on such a theory. App. 33a-35a.

In the portion of its opinion relevant to this petition, the District Court determined that Third Circuit precedent also foreclosed a First Amendment retaliation claim based on a perceived-association theory—i.e., based on an employer's mistaken belief as to an employee's political association. App. 46a (citing *Ambrose v. Twp. of Robinson*, 303 F.3d 488 (3d Cir. 2002)). The District Court observed that the law was precisely the opposite in the Sixth Circuit, which "has clearly endorsed a perceived-support theory as a basis for a freedom-of-association retaliation claim." App. 47a (citing *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012)). The District Court noted that in *Dye* the Sixth Circuit had "explicitly disapproved the reasoning of the Third Circuit." App. 48a. The District Court acknowledged:

> There is a certain logic to *Dye*. Assume that State Employer A retaliates because Employee is a Democrat, or a Republican. Obviously there is a First Amendment freedom-of-association claim to be made. If State Employer B does the same thing, with the same un-

> constitutional retaliatory motive, *and is wrong to boot*, should it really be placed in a *more* favorable position? Might the Third Circuit approach permit employers to intimidate employees into avoiding anything that might even be *mis* construed as political speech or affiliation? The *Dye* approach seems designed to afford the First Amendment some breathing space.

App. 51a-52a (footnote omitted).

The District Court also noted that in *Dye* the Sixth Circuit had relied on cases from the First and Tenth Circuits, *Welch v. Ciampa*, 542 F.3d 927 (1st Cir. 2008), and *Gann v. Cline*, 519 F.3d 1090 (10th Cir. 2008). App. 48a-51a. In the District Court's view, however, neither of these cases unambiguously endorsed a perceived-association claim as the Sixth Circuit had. App. 48a-51a.

4. The Court of Appeals for the Third Circuit affirmed. App. 1a-13a.

The Third Circuit agreed with the District Court that Heffernan had no cause of action based on his actual speech or association, because he had not campaigned for Spagnola. App. 8a-11a. The Third Circuit also agreed that circuit precedent foreclosed a claim based on his supervisors' incorrect perception of Heffernan's speech. App. 11a.

On the perceived-association theory, the Third Circuit held that a retaliatory demotion violates the First Amendment only where it is based on an employee's *actual* political association. App. 12a-13a.

This was so, the court reasoned, because "a First Amendment claim depends on First Amendment protected conduct, and there was none in this case." App. 13a (brackets and citation omitted). The Third Circuit concluded that "it is not 'a violation of the Constitution for a government employer to [discipline] an employee based on substantively incorrect information.'" App. 13a (quoting *Waters v. Churchill*, 511 U.S. 661, 679 (1994).

Like the District Court, the Third Circuit noted that in *Dye* the Sixth Circuit had reached the opposite conclusion. App. 12a. The Third Circuit agreed with the District Court that neither the First nor the Tenth Circuit had clearly endorsed the perceived-association theory. App. 12a.

The Third Circuit denied rehearing en banc. App. 72a.

REASONS FOR GRANTING THE WRIT

Demotions "based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990); *see also Branti v. Finkel*, 445 U.S. 507, 517 (1980). A public employee in a nonpolitical position is free to support one candidate or another, or indeed neither, without fear of being disciplined. But may he be disciplined because his supervisor *perceives* a political affiliation that does not in fact exist? This question has divided the circuits.

The answer will have important consequences for millions of government employees. If the majority

view among the Courts of Appeals is correct, government employees need not worry about the political views their supervisors might ascribe to them. But if the Third Circuit's view is correct, government employees had better not discuss politics. If the boss is left with the mistaken impression that an employee is a Democrat, or a Republican, or anything else, the employee can be fired. Public employees need to avoid even acting or talking in any way that a supervisor might *think* is characteristic of Democrats or Republicans, because if the supervisor gets a misimpression about the employee's political associations, the employee can be fired. A rule with such bizarre consequences cannot be right.

I. The circuits are split 3-1 on whether a public employer violates the First Amendment by demoting an employee in retaliation for what the employer mistakenly perceives as political association.

In the First, Sixth, and Tenth Circuits, a government employee may not be demoted on the grounds of his political affiliation, even if the supervisor is mistaken in ascribing political affiliation to the employee. The rule is different in the Third Circuit, where the supervisor is immune from liability if he is mistaken. The Third and Sixth Circuits have each explicitly rejected the other's view. App. 12a; *Dye*, 702 F.3d at 300. Commentators have recognized the conflict as well. *See* Nicholas A. Caselli, *Bursting the Speech Bubble: Toward a More Fitting Perceived-Affiliation Standard*, 81 U. Chi. L. Rev. 1709, 1710 (2014) ("While the First, Sixth, and Tenth Circuits

have permitted perceived-affiliation claims, the Third Circuit has barred such actions."); Kaitlyn Poirier, *Constitutional Law—The First Amendment Retaliation Doctrine—A Public Employee's Rights Regarding Perceived Political Association Retaliation*, 81 Tenn. L. Rev. 367, 377 (2014) (referring to the "circuit split on the issue of whether employer retaliation based on political non-association or perceived political association is a recognizable legal claim").

A. In the First, Sixth, and Tenth Circuits, a public employee may bring a First Amendment retaliation claim if he is demoted because his supervisor mistakenly perceives that he supports a political candidate.

The First, Sixth, and Tenth Circuits hold that perceived political association is not a permissible ground for demoting a public employee.

In *Dye*, the Sixth Circuit case, racing stewards employed by the state of Michigan were demoted and fired because their Democratic supervisors mistakenly believed they supported the Republican candidate for governor. *Dye*, 702 F.3d at 292. The court explained that these facts "present us with an issue of first impression for our court: whether individuals claiming to have been retaliated against because of their political affiliation must show that they were actually affiliated with the political party or candidate at issue. We believe that they do not." *Id.*

The Sixth Circuit reasoned that "the critical inquiry in certain political-affiliation retaliation cases is the motivation of the employer," *id.* at 299, rather than the conduct of the employee. The court found "ample evidence to support the stewards' contention that [their supervisors] attributed a political affiliation to the stewards." *Id.* at 302. The Sixth Circuit concluded that "[a]n employer that acts upon such assumptions regarding the affiliation of her employees should not escape liability because her assumptions happened to be faulty." *Id.*

The Sixth Circuit recognized that the Third Circuit "has rejected a perceived-support theory." *Id.* at 299. But the Sixth Circuit determined that the Third Circuit's view rested upon a misinterpretation of *Waters v. Churchill*, 511 U.S. 661 (1994). *Dye*, 702 F.3d at 300. The Third Circuit had "relied upon the following statement in *Waters*: '[w]e have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information.'" *Id.* at 299 (quoting *Ambrose*, 303 F.3d at 495 (in turn quoting *Waters*, 511 U.S. at 679)). The Sixth Circuit labeled the Third Circuit's reliance on *Waters* "disingenuous," however, because "[w]hen read in context, it is clear that this sentence relates only to due-process violations," not to First Amendment claims. *Dye*, 702 F.3d at 300. The Sixth Circuit accordingly found "the Third Circuit's conclusion unpersuasive." *Id.*

In *Gann*, the Tenth Circuit case, an administrative assistant to a county commissioner was fired because she had not campaigned for the

commissioner in the recent election. *Gann*, 519 F.3d at 1091-92. The Tenth Circuit held that the assistant's actual political affiliation was "irrelevant," *id.* at 1094, because "our only relevant consideration is the impetus for the elected official's employment decision vis-à-vis the plaintiff, i.e., whether the elected official prefers to hire those who support or affiliate with him and terminate those who do not." *Id.* The Tenth Circuit rejected the county commissioner's defense that because the assistant had "never made her political non-affiliation known to him," there was no causal link between the assistant's political beliefs and her firing. *Id.* The important thing, the court held, was not the assistant's actual beliefs, but rather that her firing was politically motivated—that the commissioner's action "was motivated by the fact that she did not actively campaign for him." *Id.* at 1095.

In *Welch*, the First Circuit case, a police detective was demoted for failing to support a recall campaign. *Welch*, 542 F.3d at 933-35. The First Circuit rejected the defense that there could be no First Amendment claim because the detective had not taken either side in the election. *Id.* at 938. It was enough that his supervisors believed that he was on the opposite side, even if the supervisors were wrong. "In this case," the First Circuit held, the detective "adduced evidence that officers who did not support the recall election were perceived as opposing it. Whether Welch actually affiliated himself with the anti-recall

camp is not dispositive since the pro-recall camp attributed to him that affiliation." *Id.* at 939.

The Sixth and Third Circuits have taken conflicting views of *Gann* and *Welch*. The Sixth Circuit reads the two cases the same way we do, as standing for the proposition that "retaliation based on perceived political affiliation is actionable under the political-affiliation retaliation doctrine." *Dye*, 702 F.3d at 300. The Third Circuit reads *Gann* and *Welch* differently, as holding merely that "an employer may not discipline an employee based on the decision to remain politically neutral or silent." App. 12a. The Third Circuit's view is unduly narrow. It is based on the circumstance that the employees in the two cases, like Detective Heffernan in our case, happened to be neutral in an election campaign. But the holdings of *Gann* and *Welch* are not merely that neutrality is a constitutionally protected position. Both cases clearly state that a supervisor may not demote an employee based on the supervisor's perception of the employee's political association, whether or not the supervisor's perception is accurate.[1]

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[1] In any event, even if one takes the Third Circuit's view of *Gann* and *Welch*, there is still a square conflict between the Sixth Circuit's decision in *Dye* and the Third Circuit's decision below.

B. In the Third Circuit, the government is free to demote an employee based on a supervisor's mistaken belief as to the employee's political association.

In the decision below, the Third Circuit became the only Court of Appeals to hold that a supervisor's factual mistake allows the government to demote an employee based on the employee's political association.

The Third Circuit took the first step toward this result in *Fogarty v. Boles*, 121 F.3d 886, 890-91 (3d Cir. 1997), in which it held that demotion for perceived *speech* does not violate the First Amendment. The court took a second step in *Ambrose*, in which it found no First Amendment violation where a police officer was suspended in retaliation for a particular kind of perceived speech—the officer's perceived support of a fellow officer's lawsuit against the town. *Ambrose*, 303 F.3d at 490, 495-96.

In the decision below, the Third Circuit extended *Fogarty* and *Ambrose* to immunize the government from liability for demoting an employee for his perceived support of a political candidate. The Third Circuit reasoned that because Heffernan had not actually supported Spagnola in the election, his freedom of political association could not have been abridged when his supervisors demoted him based on their misperception that he had supported Spagnola. App. 12a-13a. "[I]t is not 'a violation of the Constitution for a government employer to [discipline] an employee based on substantively incorrect information,'" the Third Circuit held, "even where

the government employer erroneously believes that the employee had engaged in protected activity under the First Amendment." App. 13a (citing *Waters*, 511 U.S. at 679).

In his petition for rehearing en banc, Heffernan explained that the Third Circuit is the only circuit to take this view, and that the law in the First, Sixth, and Tenth Circuits is the opposite. But the Third Circuit denied rehearing en banc. App. 72a. This Court is the only one that can resolve the conflict.

II. The decision below drastically curtails the First Amendment rights of government employees.

The Third Circuit's decision in this case will have disastrous consequences for public employees. If a police officer can constitutionally be demoted because his supervisor incorrectly believes that the officer supports a candidate for mayor, then any public employee can constitutionally be fired because her supervisor incorrectly believes that she is a Democrat or a Republican. Employees have to worry about saying the wrong thing at the office, for fear of leaving the boss with the wrong impression. Indeed, they have to worry about *anything* they might do, because there are so many ways of acting that can make coworkers suspect an affiliation with one party or the other. If the Third Circuit is right, it would be risky for a government employee to mention a story she saw on Fox News (for fear her boss might think she is a Republican) or a story she heard on NPR (for fear her boss might think she is a Democrat). The jokes employees tell at work, the hobbies they pur-

sue, the kinds of music they listen to—all are fodder for dismissal by a politically-motivated boss, if the Third Circuit is correct that the First Amendment offers no protection. Every workday will bring a new challenge. Does an employee dare to drive a pickup truck, or a Prius? Does she let coworkers know she enjoys country music, or rap? Does she admit to being a member of the National Rifle Association, or the Sierra Club? The Third Circuit's decision drastically curtails the First Amendment rights of public employees.

And for what purpose? The Third Circuit's decision rewards the careless or stupid supervisor, who is authorized to indulge his every whim concerning the political beliefs of his employees. The careless supervisor has license to make kneejerk disciplinary decisions without any factual investigation. Meanwhile the careful supervisor, who takes the trouble to learn whether his perception of an employee's political affiliation is actually correct, has no such license. The decision below perversely encourages a strange form of McCarthyism, in which government employers are free to make wild, baseless accusations about an employee's political beliefs, and are actually rewarded when they are *incorrect*. The Third Circuit's rule makes no sense. Where the state is wrong as a constitutional matter, it should not be absolved because it also happens to be wrong as a factual matter.

The Third Circuit believed, App. 13a, that these bizarre consequences are commanded by a single sentence in *Waters v. Churchill*, 511 U.S. 661, 679

(1994): "We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." But the Third Circuit took this sentence out of context. The sentence appears in a paragraph that is about the Due Process Clause, not the First Amendment. The very next sentence in the paragraph reads: "Where an employee has a property interest in her job, the only protection we have found the Constitution gives her is a right to adequate procedure." *Id.* This paragraph of *Waters* simply states that an innocent mistake of fact does not by itself amount to a due process violation. *Waters* certainly does not suggest that an employer who makes a factual mistake is thereby given a free pass to violate other provisions of the Constitution.

The actual holding of *Waters* supports the view of the First, Sixth, and Tenth Circuits, not the Third. *Waters* held that where a public employee is fired due to a supervisor's misperception of what the employee said, it is the supervisor's perception that matters. *Id.* at 679-80. The same is true here. The First Amendment is violated where an employer demotes an employee based on the supervisor's perception of the employee's political affiliation, whether or not that perception is correct. As the Court explained in *Branti*, "there is no requirement that dismissed employees prove that they ... have been coerced into changing, either actually or ostensibly, their political allegiance." *Branti*, 445 U.S. at 517. To prove a First Amendment violation, employees need only show that the employer was motivated by an impermissible purpose. *Id.*

The Third Circuit believed that because Heffernan had not actually engaged in any political association, his supervisors could not have abridged his freedom of association by punishing him. As the Third Circuit put it, "a First Amendment claim depends on First Amendment protected conduct, and there was none in this case." App. 13a (quotation marks and brackets omitted). But this view is mistaken. The First Amendment protects the *freedom* of association, not just the act of associating. Heffernan had a First Amendment right to engage in the very conduct for which his supervisors demoted him, even if he did not engage in it in this particular instance. To allow his supervisors to punish Heffernan for the purpose of deterring him from political participation will chill actual political participation on the part of countless other public employees on other occasions.

The First Amendment can hardly permit careless supervisors to punish employees where better-informed supervisors could not. When a public employee is demoted because his supervisor wrongly believes the employee has taken sides in an election, the supervisor is at fault just as much as he would have been if the employee actually had taken sides. The employee is harmed just as much. And the damage to all employees' First Amendment rights is at least as great, and likely greater, because of the dire consequences of giving the boss the wrong impression.[2]

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[2] This case no longer involves any question of perceived *speech*, which raises a different set of issues from perceived *association*. Demotion for perceived speech does not threaten to chill speech

III. This issue recurs frequently and affects millions of government employees.

The issue is a recurring one, because government employees frequently bring § 1983 claims based on perceived political association. *See, e.g.*, *Holsapple v. Miller*, 2014 WL 525391, *6 (E.D. Mich. 2014) ("it does not matter whether Holsapple openly supported Lee in the Sheriff election or not, only that he was perceived to do so by Sheriff Miller"); *Hein v. Kimbrough*, 942 F. Supp. 2d 1308, 1313 (N.D. Ga. 2013) (describing the question presented as "would a termination of plaintiff based on his perceived support for the defeated sheriff run afoul of the First Amendment"); *Albino v. Municipality of Guayanilla*, 925 F. Supp. 2d 186, 197 (D.P.R. 2013) (First Amendment retaliation claim based on "perceived political affiliation"); *Police and Fire Ret. Sys. v. City of Detroit*, 2011 WL 5307594, *1 (E.D. Mich. 2011) (First Amendment retaliation counterclaim based on "perceived political affiliation" with former mayor);

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the way that demotion for perceived association threatens to chill association. Whether an employee has engaged in speech is usually an easily-answered empirical question. In most cases there is little danger that a supervisor will come to the wrong conclusion about whether an employee has spoken, so employees will have little reason to fear giving the boss the wrong impression. Association is more subtle and more prone to misperception, because virtually any behavior on the part of an employee can give rise to a misimpression about the employee's political leanings. The practical differences between speech and association are already reflected in this Court's cases, which apply very different doctrinal frameworks in the two areas. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996).

Silverstein v. Lawrence Union Free School Dist., 2011 WL 1261122, *4 (E.D.N.Y. 2011) (First Amendment retaliation claim based on plaintiff's "political affiliations and/or perceived political affiliations"); *Poindexter v. Bd. of Cnty. Comm'rs*, 548 F.3d 916, 919 (10th Cir. 2008) (First Amendment retaliation claim based on "perceived political affiliation"); *Rebrovich v. Cnty. of Erie*, 544 F Supp. 2d 159, 170 (W.D.N.Y. 2008) (First Amendment retaliation claim arising from plaintiff's allegation that defendant "harassed him based on a perceived political association with the former administration"); *Harp v. DeStefano*, 2007 WL 2869831, *6 n.5 (D. Conn. 2007) (finding "sufficient basis to assert a retaliation claim based upon Harp's perceived political associations"); *Ramirez v. Arlequin*, 357 F. Supp. 2d 416, 424 (D.P.R. 2005) (First Amendment retaliation claim based on "perceived political affiliations"), *rev'd in part on other grounds*, 447 F.3d 19 (1st Cir. 2006); *Good v. Bd. of Cnty. Comm'rs*, 331 F Supp. 2d 1315, 1325 (D. Kan. 2004) ("The court must first consider whether plaintiff's right of association claim based upon the perception of the defendants constitutes a claim cognizable under the First Amendment."), *aff'd sub. nom. Good v. Hamilton*, 141 F Appx. 742 (10th Cir. 2005).

There are 21.8 million public employees in the United States. U.S. Census Bureau, *Annual Survey of Public Employment & Payroll Summary Report: 2013*, at 2 (Dec. 2014), www2.census.gov/govs/apes/2013_summary_report.pdf. The vast majority of them occupy nonpolitical positions—they are teachers and firefighters, nurses and letter carriers, bus

drivers and police officers. The answer to the question presented will profoundly shape the environment in which they work. Few constitutional questions have such direct impact on the everyday lives of so many people.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,
Third Circuit.

Jeffrey J. HEFFERNAN, Appellant

v.

CITY OF PATERSON; Mayor Jose Torres; Police Chief James Wittig; Police Director Michael Walker.

No. 14–1610

Submitted Under Third Circuit L.A.R. 34.1(a) Dec. 11, 2014

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ter, Newark, NJ, Counsel for Appellee James Witting.

Before: VANASKIE, GREENBERG, and COWEN, Circuit Judges.

VANASKIE, Circuit Judge.

Appellant Jeffrey Heffernan, a police officer in Paterson, New Jersey, was demoted after being observed obtaining a local mayoral candidate's campaign sign at the request of his mother. He brought this action under 42 U.S.C. § 1983 against Appellees, including the City of Paterson, then-Mayor Jose Torres, Police Chief James Wittig, and Police Administrator Michael Walker, for unconstitutional retaliation under the First Amendment. Heffernan now appeals from the District Court's grant of summary judgment in favor of Appellees. Because Heffernan has failed to come forward with evidence that he actually exercised his First Amendment rights, and because claims of retaliation based only on the perceived exercise of those rights are foreclosed by *Fogarty v. Boles*, 121 F.3d 886, 888 (3d Cir. 1997), we will affirm the District Court's order.

I.

Heffernan joined the Paterson Police Department in 1985, and received various commendations for his police work over the next 20 years. In late 2005, he was promoted to detective and assigned to an administrative detail in the office of the Chief of Police. The events giving rise to this case occurred in April 2006, at a time when Lawrence Spagnola, a former Paterson police chief and close friend of Heffernan's,

was pursuing a bid to unseat the then-incumbent mayor, Jose Torres. Heffernan, despite personally hoping that Spagnola would win the election, was unable to vote for Spagnola based on his city of residence, did not "work[ ] on" the campaign, (App. 2089), and did not consider himself "politically involved" with the campaign, (App. 486).

On April 13, 2006, Heffernan's bedridden mother asked Heffernan to drive into downtown Paterson to pick up a large Spagnola campaign sign, to replace a smaller one that had been stolen from her lawn. That same day, Heffernan contacted Spagnola's campaign manager to arrange a time and place when he could pick up a lawn sign. He then drove into Paterson, picked up the lawn sign from a distribution point at which Spagnola supporters and campaign staff were present, and brought the sign to his mother's house, where he left it for another family member to erect.

A Paterson police officer assigned to the security staff of Mayor Torres—Spagnola's opponent—observed Heffernan's brief encounter with the Spagnola campaign manager. Word spread quickly, and the next day, one of Heffernan's supervisors confronted him about his interaction with Spagnola's campaign staff. Heffernan protested that he "wasn't politically involved[,]" and was "just picking up a sign for [his] mom." (App. 486–87.) Nonetheless, Heffernan was immediately demoted to a "walking post" because of his "overt [ ] involvement in a political election." (App. 217.)

In August 2006, Heffernan filed this § 1983 action in the District of New Jersey, seeking compensatory and punitive damages based on Appellees' alleged

First Amendment violations. Although the precise nature of the claims articulated in Heffernan's complaint was the source of lengthy debate before the District Court, neither party appeals from that Court's most recent conclusion that the complaint states claims for (1) retaliatory demotion based on Heffernan's exercise of the right to freedom of speech, and (2) retaliatory demotion based on his exercise of the right to freedom of association.

The parties filed cross-motions for summary judgment. Judge Sheridan, who was originally assigned to this matter, denied both motions without permitting the filing of briefs in opposition. For reasons that are not entirely clear, Heffernan proceeded to trial on only his free-association claim, which resulted in a jury verdict of $105,000 in his favor. After trial, however, Judge Sheridan retroactively recused himself based on what he concluded was a conflict of interest and vacated the jury's verdict.

The case was reassigned to Judge Cavanaugh, who revisited the parties' motions for summary judgment but, like Judge Sheridan, did not allow briefing beyond the original filings. He then granted summary judgment for Appellees on the free-expression claim, but entirely failed to address the free-association claim—i.e., the claim on which the jury had returned a verdict in Heffernan's favor. On appeal, a panel of this Court concluded that the District Court had erred by granting summary judgment without permitting the parties to file briefs in opposition, and by failing to consider the viability of Heffernan's free-association claim. 492 Fed. Appx. 225 (3d Cir. 2012).

On remand, the case was reassigned yet again, this time to Judge McNulty, who permitted a full round of fresh briefing on the parties' cross-motions for summary judgment. In an opinion filed on March 5, 2014, Judge McNulty concluded that Heffernan had adequately pleaded and prosecuted his free-association claim. He nonetheless found that Heffernan had failed to produce evidence that he actually exercised his First Amendment rights, and in the alternative, Heffernan was foreclosed from seeking compensation under § 1983 for retaliation based only on the perceived exercise of those rights. Accordingly, Judge McNulty granted summary judgment in favor of Appellees on all counts. Heffernan filed a timely notice of appeal.

II.

The District Court had jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343. We have appellate jurisdiction under 28 U.S.C. § 1291. Our review of the District Court's order granting summary judgment is plenary. *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 134 (3d Cir. 2013). Summary judgment is appropriate where the movant establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P 56(a). We view the evidence "'in the light most favorable to the nonmoving party.'" *Trinity Indus., Inc.*, 735 F.3d at 134–35 (quoting *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 395 (3d Cir. 2010)).

III.

The First Amendment generally prohibits a public employer from disciplining, demoting, or firing an employee based on that employee's exercise of First Amendment rights, including speaking out on a matter of public concern or engaging in expressive conduct to the same effect, *see Fogarty*, 121 F.3d at 888, or associating with a particular political party, *see Goodman v. Pa. Turnpike*, 293 F.3d 655, 663–64 (3d Cir. 2002) (citing *Rutan v. Rep. Party of Ill.*, 497 U.S. 62, 75, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)).[1] This appeal raises three issues: (1) whether the District Court erred by considering Appellees' motion for summary judgment on Heffernan's free-association claim; (2) whether the record contains evidence upon which a jury could find that Heffernan actually exercised his free-speech or free-association rights when he picked up a political sign as a favor for his mother; and (3) whether Heffernan nonetheless may obtain relief for the violation of a constitutional right under § 1983 even where he did *not* exercise any First Amendment right, but his employer mistakenly believed he did.

A.

Heffernan first argues that the District Court should not have considered Appellees' motion for summary judgment on his free-association claim,

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[1] The primary exceptions, not relevant here, are where the government's concern "with the effective and efficient fulfillment of its responsibilities to the public" outweighs the employee's free-speech rights, *Fogarty*, 121 F.3d at 888, or where "party affiliation is an appropriate requirement for the position involved," *Goodman*, 293 F.3d at 663.

and should instead have allowed that claim to proceed to trial without further scrutiny. In support of this unusual proposition, he notes that a jury already returned a verdict—albeit one vacated on procedural grounds—in his favor. Therefore, according to Heffernan, the free-association claim must have had sufficient factual support to permit that verdict.

Heffernan believes we acknowledged as much in our previous opinion in this case. There, we ordered that on remand, the District Court, along with deciding whether Heffernan had adequately "pleaded and prosecuted" his free-association claim, "should also consider the appropriate remedy, whether it be dismissal of the Free Association claim, reopening discovery solely on Free Association, or proceeding to trial." 492 Fed. Appx. at 230. The lack of a reference to summary judgment, in Heffernan's view, bolsters his argument that the District Court erred by considering Appellees' motion as to the free-association claim.

This is a misreading of our opinion. On the previous appeal, it was apparent that the District Court had made two reversible errors. First, the Court granted summary judgment for Appellees on Heffernan's free-speech claim without permitting Heffernan to file a brief in opposition; second, the Court's opinion made no reference whatsoever to Heffernan's still-pending free-association claim. As a result, we ordered the District Court "to permit the parties to re-file their summary judgment motions with updated statements of undisputed material fact and to allow opposition and reply briefing." *Id.* at 229. The portion of the opinion on which Heffernan relies simply directed the District Court to consider Appel-

lees' argument that Heffernan had not adequately pleaded or prosecuted his free-association claim—which to that point had been overlooked in the case's complicated procedural history. In sum, our disposition of that appeal had no bearing on Appellees' right to contest the sufficiency of Heffernan's evidence on his free-association claim through a motion under Rule 56 for summary judgment.

Moreover, Appellees filed a timely motion under Rule 56 even before the first trial in this case. They did not receive the benefit of a procedurally sound ruling on that motion until it was considered by the District Court in the opinion that is the subject of this appeal. We thus reject Heffernan's argument that the District Court improperly considered the merits of Appellees' motion for summary judgment on his free-association claim.

B.

We next address whether the District Court properly granted summary judgment on Heffernan's free-speech and free-association claims insofar as they are predicated on the allegation that he suffered retaliation for actually engaging in speech or conduct protected under the First Amendment.

First, with respect to his free-speech claim, Heffernan must establish that: "(1) [he] spoke on a matter of public concern; (2) [his] interest in that field outweighs the government's concern with the effective and efficient fulfillment of its responsibilities to the public; (3) the speech caused the retaliation; and (4) the adverse employment decision would not have occurred but for the speech." *Fogarty*, 121 F.3d at

888 (citing *Green v. Phila. Housing Auth.*, 105 F.3d 882, 885 (3d Cir. 1997)). Here, the only element in dispute is the first—i.e., whether a jury could find that Heffernan actually spoke on a matter of public concern. We note that Heffernan need not prove he communicated a message *verbally*—and indeed, the record is devoid of such evidence—because expressive conduct also is protected under the First Amendment. Such conduct exists where "an intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). "[T]his is a fact-sensitive, context-dependent inquiry, and ... the putative speaker bears the burden of proving that his or her conduct is expressive." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 161 (3d Cir. 2002) (citations and quotation marks omitted).

Heffernan's best argument here is that his actions had the *effect* of assisting Spagnola's campaign, and indeed, Torres's supporters construed his conduct as an expression of direct personal support for the campaign. But, as recognized by the District Court, this is only half the picture. Heffernan repeatedly disavowed anything resembling "an intent to convey a particularized message." For instance, at deposition, he denied "working on" Spagnola's campaign, (App. 2089), being "politically involved" with the campaign, (App. 486), or even "supporting [Spagnola] for mayor" at all, (App. 191). Instead, in his own description of the incident to a friend, "I was picking up a sign for my mother, and that's all I was doing." (App. 483.) In light of this unambiguous testimony,

no room exists for a jury to find that Heffernan intended to convey a political message when he picked up the sign at issue. The District Court thus properly granted summary judgment on Heffernan's claim of retaliation based on the actual exercise of his free-speech rights.

Nor does Heffernan fare better on his free-association claim, which requires proof "(1) that the employee works for a public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision." *Goodman*, 293 F.3d at 663–64 (citations and quotation marks omitted). The first and third elements are plainly established on the record before us. With respect to the second element, Heffernan maintains that his close friendship with Spagnola, his passive desire to see Spagnola win the election, and the belief of Spagnola's campaign manager that Heffernan was a "supporter" of the campaign, (App. 391), taken together, are sufficient to prove that he "maintained an association" with the Spagnola campaign.

For the same reasons described above, however, we conclude that Heffernan has failed to raise a genuine dispute of material fact on this point. Heffernan himself confirmed that regardless of what others may have perceived, he did not have any affiliation with the campaign other than the cursory contact necessary for him to pick up the sign for his mother. Consequently, the record is insufficient to allow a jury to return a verdict in Heffernan's favor on his claim of retaliation based on the actual exer-

cise of his right to freedom of association. We will affirm the District Court's grant of summary judgment with respect to Heffernan's claim of retaliation based on the actual exercise of his free-association rights.

C.

In the alternative, Heffernan argues that he is entitled to proceed to trial on both claims under a "perceived-support" theory, i.e., where the employer's retaliation is traceable to a genuine but incorrect or unfounded belief that the employee exercised a First Amendment right. In other words, Heffernan asks us to eliminate a traditional element of a First Amendment retaliation claim—namely, the requirement that the plaintiff in fact exercised a First Amendment right.

That argument is squarely foreclosed by our own binding precedent, which holds that a free-speech retaliation claim is actionable under § 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights. *See Ambrose v. Twp. of Robinson*, 303 F.3d 488, 496 (3d Cir. 2002); *Fogarty*, 121 F.3d at 891. All of our sister circuits to consider this issue in the context of a free-speech claim have reached the same conclusion. *See Wasson v. Sonoma Cnty. Junior Coll.*, 203 F.3d 659, 662 (9th Cir. 2000); *Jones v. Collins*, 132 F.3d 1048, 1054 (5th Cir. 1998); *Barkoo v. Melby*, 901 F.2d 613, 619 (7th Cir. 1990). Because Heffernan provides no convincing reason to distinguish these cases, the District Court correctly denied Heffernan's alternative basis for relief with respect to his free-speech claim.

Heffernan's last contention is that *Ambrose* and *Fogarty*, each of which addressed free-speech claims, leave room for us to conclude that he may seek relief under § 1983 on a perceived free-*association* claim. By way of example, he directs us to *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012), in which the Sixth Circuit addressed the employee-plaintiffs' claim of workplace retaliation based on their supposed affiliation with the Republican Party. There, the panel concluded that the employer's mere assumption of an affiliation, whether founded or not, was sufficient for the plaintiffs' claim to proceed. *Id.* at 299–300.

To begin with, we have no reason to believe that the holding of *Dye* can be reconciled with *Ambrose* and *Fogarty*—and nor did the Sixth Circuit. *See id.* at 300 ("[W]e find the Third Circuit's conclusion [in Ambrose] unpersuasive."). But beyond that, we are not convinced that *Dye* provides any reason to depart from our established holding on this point. Most notably, the *Dye* panel suggested it was "adopt[ing] the reasoning" of the First and Tenth Circuits in *Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008), and *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008), both of which involved adverse employment actions taken against employees who did not adopt a position on a local political issue. *Dye*, 702 F.3d at 300. Like the District Court, however, we read *Welch* and *Gann* as natural applications of the settled First Amendment principle that an employer may not discipline an employee based on the decision to remain politically neutral or silent. *See Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 272–73 (3d Cir. 2007). And indeed, the emphasis on that point in

Welch and *Gann* is, if anything, consistent with the admonition in *Ambrose* and *Fogarty* that a First Amendment retaliation claim under § 1983 must rest upon the actual exercise of a particular constitutional right—whether it be the right to speak on a political issue, to associate with a particular party, or to not speak or associate with respect to political matters at all.

Heffernan, however, has not presented evidence that he was retaliated against for taking a stand of calculated neutrality. Instead, he argues that Appellees demoted him on a factually incorrect basis. But it is not "a violation of the Constitution for a government employer to [discipline] an employee based upon substantively incorrect information," *Waters v. Churchill*, 511 U.S. 661, 679, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994), even where the government employer erroneously believes that the employee had engaged in protected activity under the First Amendment. To paraphrase our colleague, Judge Roth, "a [First Amendment] claim depends on [First Amendment protected conduct], and there was none in this case." *Pro v. Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996) (Roth, J., dissenting). Accordingly, we will affirm the District Court's grant of summary judgment with respect to Heffernan's claims insofar as they are based on a "perceived-support" theory of recovery.

IV

For the foregoing reasons, we will affirm the District Court's order of March 5, 2014 granting summary judgment in favor of Appellees.

APPENDIX B

United States District Court,
D. New Jersey

Jeffrey HEFFERNAN, Plaintiff,
v.
CITY OF PATERSON, Mayor Jose Torres, Police Chief James Wittig, and Police Director Michael Walker, Defendants.

Civ. No. 06–3882 (KM)
Signed March 5, 2014

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McNULTY, District Judge:

The plaintiff, Jeffrey Heffernan, a veteran police officer in the City of Paterson, was demoted following a report that he had picked up a lawn sign from a campaign worker for a mayoral candidate. Heffernan has made a number of claims, but the one that

best fits the evidence is that the Defendants,[2] his employers, believed Heffernan had engaged in political speech or campaigning, when in fact he had not. At least one other Circuit has recognized a First Amendment claim for retaliation based on such a mistaken belief. The United States Court of Appeals for the Third Circuit, however, has rejected that "perceived support" rationale—explicitly as to free speech, and by strong implication as to freedom of association. As to this and related claims, Defendants and Plaintiff have moved for summary judgment. Following what I believe to be the law of this Circuit, I will enter summary judgment in favor of Defendants and against Heffernan.

FACTUAL BACKGROUND

The facts are stated briefly here, and developed in greater detail in the discussion of the issues.

The plaintiff, Jeffrey Heffernan, has been an officer in the Paterson Police Department since 1985. In 2005, he became a detective, assigned to the office of Police Chief James Wittig. At all relevant times, Defendant Jose Torres was the Mayor of Paterson and Defendant Michael Walker was the Police Director.

On April 13, 2006, Heffernan's mother, who was ill, asked him to bring her a lawn sign supporting the candidacy of Lawrence Spagnola (the former chief of police) for mayor of Paterson. She wanted to

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[2] Plaintiff seems to have agreed to voluntarily dismiss Police Director Michael Walker as a defendant in early 2009. (*See* Final Pretrial Order (ECF No. 53–1) at p. 44). I see no notice or order to that effect, however.

place the sign in front of her Paterson home. Heffernan called a campaign representative he knew. That representative suggested that Heffernan contact Spagnola's campaign manager, Councilman Aslon Goow, who was distributing signs around Paterson. Later that day, while off duty, Heffernan and his son drove to a street corner in Paterson to get a large lawn sign from Goow. (Pltf's 56.1 Statement ¶¶ 4, 7, 8; Dfd's Resp. Statement ¶¶ 4, 7, 8; see Pltf's Trial Testimony, Lockman Cert. (ECF No. 190–5) Ex. CC at A488). At the street corner, Heffernan spoke to Goow and obtained the sign for his mother. There is a dispute as to whether there was a gathering of Spagnola supporters at the corner. (Pltf's 56.1 Statement ¶ 10; Dfd's Resp. Statement ¶ 10).

Officer Arsenio Sanchez, a member of defendant Mayor Torres's security detail (Sanchez Trial Testimony, Lockman Cert. *567 Ex. BB at A 276), was on traffic patrol at the time. Sanchez saw Goow, Heffernan, and Heffernan's son at the corner. (Pltf's 56.1 Statement ¶ 11 (citing Sanchez testimony)). There is a record of a cell phone call from Wittig to Sanchez minutes later. Sanchez denied under oath that he spoke with Wittig that day. (Lockman Cert. Ex. BB at A284–285) Wittig, however, testified in his deposition that he spoke to Sanchez, who advised him that "Heffernan was out hanging political signs in the second ward with Councilman Goow." (Wittig Dep. Tr., Afanandor Cert. (ECF No. 196–1) Ex. 5 at 75:18 to 76:21). Heffernan contends that Sanchez and Wittig did indeed speak about him in that call. (*Id.* at ¶¶ 13–14; Lockman Cert. Ex. BB at A292).

At any rate, word got back to the office. The parties agree that the next day, Lieutenant Patrick Pa-

pagni informed Heffernan that he was being transferred out of the Chiefs office. After Heffernan picked up his personal belongings, Papagni and Deputy Chief William Fraher told him that he was being demoted to walking patrol because of his political involvement with Spagnola. (Pltf's 56.1 Statement ¶ 34; Dfd's Resp. Statement ¶ 34). Wittig testified that Heffernan "breached his trust" as well as office policy by being "overtly involved in the political campaign." That political involvement, said Wittig, was the cause of his demotion. (Wittig Trial Testimony, Lockman Cert. Ex. DD at A644–646).

Heffernan seemingly did deliver the sign to his mother's home in Paterson. He did not display the sign or post it on his mother's property. (Dep. Testimony of Heffernan, Ex. S to Lockman Cert. (ECF No. 197–4) at A199 at 132:23–133:17).

Heffernan was a close friend of Spagnola. (Pltf's 56.1 Statement ¶ 5; Dfd's Resp. Statement ¶ 5). He "supported" Spagnola's candidacy in the sense that he wanted Spagnola to win, (Pltf's Testimony, Lockman Cert. Ex. CC at A486:17–23). Heffernan did not, however, live in Paterson and he was not eligible to vote there. (*Id.*). A campaign representative told Heffernan "it would help them out" if he met Goow at the street corner (*id.* at A488:7). Heffernan also testified that he believed he was associated with people in the campaign. (*Id.* at A637:13–15).

PROCEDURAL HISTORY

Heffernan filed this action on August 17, 2006. The case was initially assigned to District Judge Peter G. Sheridan. Shortly before trial, the defendants

moved for summary judgment on the ground that Heffernan had not engaged in any protected speech. On April 3, 2009, Judge Sheridan denied that motion without the benefit of briefing by Heffernan. (ECF No. 62). In that ruling, Judge Sheridan remarked that Heffernan's claim more closely resembled a freedom-of-association claim (Opinion on the Record, Lockman Cert. Ex. F at A135–137) Defendants, at the outset of trial, expressed some surprise that any freedom-of-association claim was in the case. Trial Transcript, Lockman Cert. Ex. BB at A270–271). Judge Sheridan then clearly ruled that the Final Pretrial Order adequately set forth freedom of association as an issue to be tried, and that it would be tried. (*Id.*). *See also* pp. 14–17, *infra*. Following Judge Sheridan's ruling, the parties tried the case on the issue of whether Heffernan's freedom of association rights had been violated.

At the conclusion of that April 2009 trial, the jury entered a verdict against Mayor Torres and Chief Wittig. The jury found that Torres and Wittig had retaliated against Heffernan for exercising his first amendment right of association. It awarded $37,500 in compensatory damages against Torres, $37,000 against Wittig, and $15,000 in punitive damages against each. (ECF No. 76–77). Judgment was entered accordingly. (ECF No. 78). Heffernan, though victorious, moved for a new trial, arguing, among other things, that the Court erred by not allowing Heffernan to go forward with his freedom-of-*speech* claim. (ECF No. 80). Meanwhile, the Defendants appealed the judgment, arguing, *inter alia*, that Judge Sheridan erred in permitting Heffernan to go for-

ward on a freedom-of-*association* claim. (ECF No. 83).

While post-trial motions were pending, Judge Sheridan became aware of a conflict of interest. Judge Sheridan acknowledged that his earlier work at a law firm created an appearance of impropriety and that "[t]he only recourse is to set aside the verdict, and permit a new trial before a different judge." (ECF No. 108). Judge Sheridan therefore entered an Order granting a new trial. (ECF No. 109–110). The case was then reassigned to District Judge Dennis M. Cavanaugh.

Judge Cavanaugh initially told the parties that he would not consider any dispositive pre-trial motions or permit the parties to re-raise issues previously decided. (ECF No. 143). The parties objected. A few weeks later, Judge Cavanaugh relented in part, and permitted the parties to re-file their earlier motions. (ECF No. 147). Torres and Wittig re-filed their earlier motions for summary judgment. (ECF No. 158, 159, 160). Judge Cavanaugh, unlike Judge Sheridan, granted the motions of Defendants Torres and Wittig for summary judgment. He held that Heffernan did not engage in any protected speech and thus had no cognizable First Amendment freedom-of-speech retaliation claim. (ECF No. 167–168). Judge Cavanaugh's opinion and order, however, did not address Heffernan's freedom-of-association claim, the one on which the jury had previously entered a verdict in Heffernan's favor.

Heffernan appealed. The Third Circuit reversed Judge Cavanaugh's judgment on August 7, 2012. (ECF No. 179). The Court of Appeals ruled that Judge Cavanaugh should have afforded Heffernan

an opportunity to file papers in opposition to the renewed summary judgment motions. (*Id.* at 6).[3] The Court of Appeals also ruled that facts adduced at the April 2009 jury trial were relevant to summary judgment and should have been considered. Such evidence, "even [from a trial] involving a later recusal, [ ] is at least as reliable as other pieces of evidence, such as affidavits, that are routinely considered on summary judgment." (*Id.* at 8). Finally, the Court of Appeals ruled that "the able District Judge erred by failing to address Heffernan's Free Association Claim ... before entering judgment in favor of the Defendants." (*Id.* at 9).

The Court of Appeals remanded the case with instructions that the District Court (a) permit the filing of updated motions for summary judgment; (b) permit the filing of opposition and reply briefs; (c) freely consider evidence adduced at the 2009 trial in connection with those motions; and (d) determine whether the freedom of association claim is properly before the district court. (*Id.* at 8–10).

After remand, on May 17, 2013, this case was reassigned to me. (ECF No. 202) In accordance with

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[3] Judge Sheridan denied Defendants' earlier summary judgment motions on the brink of trial, without the benefit of opposition briefing from Heffernan. At that time, Heffernan obviously had no cause for complaint. After Judge Sheridan granted a new trial and the case was first reassigned, Judge Cavanaugh permitted the parties to re-file earlier motions, but did not permit any further briefing. That left Heffernan in the posture of not having filed any opposition to Defendants' renewed summary judgment motions. Thus, when Judge Cavanaugh decided Defendants' renewed motions—this time *against* Heffernan—he did so without the benefit of briefing from Heffernan.

the Court of Appeals' four-part mandate (*see supra*), (a) Defendants have submitted renewed motions for summary judgment; (b) the Court has accepted opposition and reply papers; (c) those papers have cited, and I have considered, evidence of record from the April 2009 trial; and (d) I have permitted Heffernan to assert his claim based on the right to freedom of association under the First Amendment.

Currently before this Court are Defendants' renewed summary judgment motions, now fully briefed by both sides, as well as Plaintiff's motion for partial summary judgment. Heffernan contends that he was demoted in retaliation for his exercise of his First Amendment freedoms of speech and political association. Defendants assert that Heffernan did not speak or express himself at all, so no free speech claim is presented. Defendants add that no freedom of association claim was properly pled or otherwise asserted. In the alternative, however, they argue that any freedom-of-association claim should be dismissed on summary judgment. In addition, Defendants assert that, under Section 1983, the City of Paterson cannot be held vicariously liable for the actions of Wittig and Torres, the individual defendants remaining in this case, and that no evidence at all connects Mayor Torres to Heffernan's demotion. (*See* Dfd's Mot. for Summ. J. (ECF No. 189); Dfd's Opp. to Pltf's Mot. for Summ. J. (ECF No. 196); Dfd's Reply in Further Supp. (ECF No. 201)).

DISCUSSION

Heffernan argues that he suffered retaliation after exercising two First Amendment freedoms: free-

dom of association and freedom of speech. Upon review of the entire record, I find that the arguments of Defendants Torres and Wittig are correct under the law of this Circuit. I will enter summary judgment in their favor, and deny Heffernan's motion. That ruling renders moot the issue of whether the City of Paterson or Mayor Torres would have been derivatively liability for those alleged First Amendment violations.

A. Legal Standard on Motion for Summary Judgment

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Kreschollek v. S. Stevedoring Co.*, 223 F.3d 202, 204 (3d Cir. 2000). In deciding a motion for summary judgment, a court must construe all facts and inferences in the light most favorable to the nonmoving party. *See Boyle v. County of Allegheny Pennsylvania*, 139 F.3d 386, 393 (3d Cir. 1998). The moving party bears the burden of establishing that no genuine issue of material fact remains. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[W]ith respect to an issue on which the nonmoving party bears the burden of proof ... the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to sup-

port the nonmoving party's case." *Id.* at 325, 106 S.Ct. 2548.

If the moving party meets its threshold burden, the opposing party must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505; *see also* Fed.R.Civ.P. 56(c) (setting forth types of evidence on which nonmoving party must rely to support its assertion that genuine issues of material fact exist). "[U]nsupported allegations ... and pleadings are insufficient to repel summary judgment." *Schoch v. First Fid. Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990); *see also Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir. 2001) ("A nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial.").

When, as here, the parties file cross-motions for summary judgment, the governing standard "does not change." *Clevenger v. First Option Health Plan of N.J.*, 208 F. Supp. 2d 463, 468–69 (D.N.J. 2002) (citing *Weissman v. U.S.P.S.*, 19 F. Supp. 2d 254 (D.N.J. 1998)). The court must consider the motions independently, in accordance with the principles outlined above. *Goldwell of N.J., Inc. v. KPSS, Inc.*, 622 F. Supp. 2d 168, 184 (2009); *Williams v. Philadelphia Hous. Auth.*, 834 F. Supp. 794, 797 (E.D.Pa. 1993), *affd.*, 27 F.3d 560 (3d Cir. 1994). That one of the cross-motions is denied does not imply that the other must be granted. For each motion, "the court construes facts and draws inferences in favor of the party against whom the motion under consideration is made" but does not "weigh the evidence or make credibility determinations" because "these tasks are

left for the fact-finder." *Pichler v. UNITE*, 542 F.3d 380, 386 (3d Cir. 2008) (internal quotation and citations omitted).

B. Freedom of Speech Claim

Heffernan claims that Defendants retaliated against him for engaging in speech protected by the First Amendment, and has moved for entry of partial summary judgment. Defendants have moved for summary judgment dismissing this freedom-of-speech claim. The first issue is whether Heffernan *did* engage in protected speech or expression. The second is whether he nevertheless has a cause of action because Defendants retaliated against him based on their *belief* that he had engaged in protected speech or expression. I also consider whether Heffernan aided and abetted the speech of his mother.

1. Actual First Amendment speech

A public employee is protected by the First Amendment if he[4] can show that he suffered an adverse employment decision as a result of speaking on a matter of public concern, and that his First Amendment interest outweighs the government's concern "with the effective and efficient fulfillment of its responsibilities to the public." *Fogarty v. Boles*, 121 F.3d 886, 888 (3d Cir. 1997) (citing *Green v. Philadelphia Housing Auth.*, 105 F.3d 882, 885 (3d Cir. 1997)). "This test is based on a series of cases in which the Supreme Court struck a balance between

[4] Heffernan happens to be male. For simplicity, I will use the male pronoun even when, as here, speaking genetically.

the employee's right to speak and the government-employer's duty to serve the public productively." *Id.* at 888–89 (citing, *inter alia*, *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)).

The initial question is whether Heffernan engaged in protected speech. "[I]n the absence of protected speech, a public employee may be discharged even if the action is unfair, or the reasons "are alleged to be mistaken or unreasonable."" *Id.* at 889 (quoting *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). In *Fogarty*, for example, the Third Circuit affirmed summary judgment against the plaintiff, a teacher, who lost his job after being accused of contacting a newspaper reporter about harmful pollution emanating from construction at the school. *Id.* at 887, 891. The teacher insisted that the principal's information was false; the teacher never spoke to the newspaper reporter. The teacher sued the principal, but lost on summary judgment. Affirming, the Third Circuit "conclude[d] that the absence of speech—in fact, its explicit disclaimer by plaintiff—is fatal to the plaintiffs claim." *Id.* at 891.

Here, too, Heffernan allegedly suffered an adverse employment action based on speech that, by his own account, did not occur. The alleged speech—political campaigning—would obviously constitute protected speech. But Heffernan has always denied any political link to Spagnola. He has stated repeatedly that he delivered the Spagnola lawn signs, not as a political statement, but as a favor to his ailing mother.

Defendants compare this case to *Lombardi v. Morris County Sheriff's Dep't*, 2007 WL 1521184, 2007 U.S. Dist. LEXIS 37176 (D.N.J. May 22, 2007) (Debevoise, S.D.J.). There, the plaintiff alleged retal-

iation motivated by his "support" of a fellow officer in an internal affairs investigation. The plaintiff served as the officer's union representative, and his support consisted of "merely standing by [the officer] and being a witness" to an interview. The plaintiff "did not make any comments during the interview." *Id.* at *6, 2007 U.S. Dist. LEXIS 37176 at *17. Quoting *Fogarty*'s rule regarding the "absence of speech," Judge Debevoise ruled that the plaintiff had not engaged in protected speech, and therefore had no cause of action. *Id.* at *6, 2007 U.S. Dist. LEXIS 37176 at *18–*19.

Heffernan seeks to distinguish his case from *Lombardi*, arguing that his purported speech was political in nature. This argument—that Heffernan engaged in political speech in *fact*—is factually dubious, because it contradicts Heffernan's own testimony.[5] It also bypasses the issue of whether Heffernan spoke *at all*, arguing instead that any speech must have been protected because Heffernan undertook it in connection with the Spagnola campaign. (Pltf's Br. Opp. Dfd's Mot. for Summ. J. at 22). Heffernan's real stumbling block here—like that of the plaintiff in *Lombardi*—is his failure to express himself. Heffernan concedes that "[he] did not 'speak.'" (*Id.* at 22–24). Even assuming *arguendo* that Heffernan privately held politically—charged feelings in favor of

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[5] I will discuss separately the argument that Heffernan's superiors *perceived* that he had engaged in protected speech. *See* pp. 12–13, *infra*. Heffernan testified that he wanted Spagnola to win out of friendship, but the only actions at issue here—the pick-up and delivery of the yard sign—were carried out as a favor to Heffernan's mother, not to express Heffernan's thoughts or beliefs. *See, e.g.*, pp. 8–12, *infra*.

Spagnola's candidacy—and he never makes such a contention-he did not say a word regarding Spagnola.

Actual speech, then, is not the issue. I turn now to the issue of whether Heffernan's alleged conduct nevertheless consisted of political expression.

2. Actual First Amendment expressive conduct

Conceding that he did not speak, Heffernan ascribes expressive meaning to his conduct. He argues that he facilitated expression (his mother's posting of a lawn sign) and thereby disseminated the political message of the Spagnola campaign.

Expressive conduct is accorded the same protection as actual speech. *Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (U.S. 2003). Thus, certain non-verbal acts of communication, if sufficiently expressive or symbolic, will satisfy the speech-in-fact requirement of *Fogarty*. *Herman v. County of Carbon*, 2008 WL 2433107, *4, 2008 U.S. Dist. LEXIS 46551, *11–12 (M.D. Pa. June 12, 2008) (harmonizing *Fogarty* and *Black*) (citing *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 158 (3d Cir. 2002)).

"Expressive conduct exists where 'an intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it,'" *Egolf v. Witmer*, 421 F. Supp. 2d 858, 868 (E.D. Pa. 2006) (quoting *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)). That two-part "particularized message" test has been applied to protect, for example, picketing, armband-wearing, flag-waving

and flag-burning. *See Johnson*, 491 U.S. at 404, 109 S.Ct. 2533. To put it another, somewhat tautological, way, expressive conduct exists where, "'considering 'the nature of the activity, combined with the factual context and environment in which it was undertaken,' we are led to the conclusion that the 'activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.' " *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002) (quoting *Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086, 1090 (3d Cir. 1995)); *see Egolf*, 421 F. Supp. 2d at 868 (citing *Tenafly Eruv*). In *Tenafly Eruv*, the Third Circuit underscored that "this 'is a fact-sensitive, context-dependent inquiry,' and [ ] the putative speaker bears the burden of proving that his or her conduct is expressive." 309 F.3d at 161 (quoting *Troster*, 65 F.3d at 1090).

Here, nothing in the evidence indicates that Heffernan's conduct—obtaining a lawn sign for his mother—was intended to convey a message. Nor was Heffernan's conduct, viewed in context, imbued with elements of communication. In many cases, this might present a factual issue for trial. Here, however, Heffernan himself has repeatedly, in sworn testimony, couched his own conduct as a simple favor to his mother, devoid of political motivation or communicative content. He delivered the sign to his mother as a convenience; he did not post the sign on her lawn, or display it in any manner.

If there were any message here, it would be a political one. Heffernan, however, has consistently denied having any political purpose. At his deposition, he testified:

Q. And the first amendment violation that you're particularly relying upon is the right to post a sign of someone that you were supporting for mayor, correct?

A. I wasn't supporting him for mayor.

Q. I apologize. Let me rephrase that. That your mother was supporting for mayor?

A. Yes.

Q. Now, you couldn't vote for Larry Spagnola, could you?

A. No.

Q. Because you weren't a resident of the City of Paterson?

A. Correct.

Q. But you were, in fact, going to post a sign on your mother's lawn?

A. No. I was going to pick it up and bring it to her. I wasn't going to post it. I didn't have tools with me. My older brother can take care of that.

(Dep. Testimony of Heffernan, Ex. S to Lockman Cert. (ECF No. 197–4) at A199 at 132:23–133:17). In the same deposition, he characterized his relationship to Spagnola as personal, not political:

Q. Other than the incident that you've referenced in your complaint about getting a sign for your mother, did you do anything else to outwardly support Larry Spagnola in his bid for mayor?

A. No.

Q. Were you working on his campaign?

A. No.

Q. During the time that he was running for this position, did you have conversations with Larry Spagnola?

A. Absolutely.

Q. How often would you speak to him?

A. I spoke to him once or twice, three times a week.

Q. Is he a close personal friend of yours?

A. Yes, he is.

(*Id.* at A193A at 55:24–56:15).

On direct examination at trial, Heffernan confirmed that his relationship with Spagnola was "personal" in nature. (*Id.* at Ex. CC at A–486:8–19). He conceded that he wanted Spagnola to win. He did not testify, however, that he picked up the sign to express his support for Spagnola, or that his actions were was motivated by any desire to see Spagnola win. Rather, the precipitating event was that his mother had "complain[ed] about a few things, and one of them was that somebody had stolen her Laurence Spagnola sign for mayor off the lawn. It was a small one. She asked me if I could reach out to Mr. Spagnola to see if I can [replace it]." (*Id.* at A–487:15–19).

Later, also on direct examination at trial, Heffernan described his response to the accusation that he was campaigning for Spagnola: Heffernan told a colleague that "I was picking a sign up for my mother, and that's all I was doing." (*Id.* at A496:17–18). And upon being advised of his job transfer, he "said to [Lieutenant Papagni] I wasn't politically involved. I was just picking up a sign for my mom." (*Id.* at A499:25–A500:1). Heffernan again emphasized that he "wasn't involved in the campaign." (*Id.* at A501:11).

On cross-examination at trial, Heffernan again confirmed that he intended nothing political:

Q. You agree that even though this was a very heated campaign, you were not involved in Mr. Spagnola's campaign. Correct?

A. Correct.

Q. You agree that you were not ever hanging signs for the Spagnola campaign. Correct?

A. Correct.

Q. So when Aslon Goow said yesterday that you worked on the Spagnola campaign, that would be incorrect?

A. He didn't say that.

Q. Answer my question. If Aslon Goow had said that at one point in time you worked for the campaign, he would be incorrect. Right?

A. Correct.

Q. Because you have repeatedly indicated in deposition transcripts that you were not involved in Mr. Spagnola's campaign. Right?

A. Correct.

(*Id.* at A592:20–A593:11).

In sum, Heffernan never testified that his conduct was spurred by any political motive or belief. He repeatedly testified that his conduct was devoid of political motivation and unconnected to the Spagnola campaign, in which he never participated. No message was conveyed or intended. I give due weight to Heffernan's assertion that he "supported" Spagnola. I read that as a general expression of friendship or sympathy that must be read in context with Heffernan's deposition testimony that he "wasn't supporting [Spagnola] *574 for mayor." I also note Heffernan's statement that he met Mr. Goow on the Paterson street corner because it would "help" the campaign. I take this to refer to logistics; running this

errand would spare a campaign worker from doing so. These two statements, in context, are not sufficient to create an issue of fact. And the evidence does not show that Heffernan's actions were intended to, or did, "convey a particularized message." *See Texas v. Johnson*, 491 U.S. at 404, 109 S.Ct. 2533; *Egolf*, 421 F. Supp. 2d at 868. Heffernan has never testified that he expressed, or intended to express, anything. Passively desiring to see a candidate win is not the same as actually expressing support for the candidate or his views.

Moreover, the simple act of transporting, as opposed to posting, a sign does not approach the level of conduct that has been found to be expressive. *See Johnson*, 491 U.S. at 404, 109 S.Ct. 2533 (stating that second required showing is that the "likelihood was great that the message would be understood by those who viewed it"). Such conduct was not highly likely to be understood as expressive. Heffernan did not march with the sign or post it anywhere; he loaded it in his vehicle and delivered it to his mother. His conduct was not akin to, for example, visible picketing, wearing an armband, or burning a flag. *See id.* From a First Amendment standpoint, Heffernan's position was not so different from that of the printer who manufactured the sign, or the trucker who delivered the signs to campaign headquarters.

Finally, it is very clear that the context and circumstances of Heffernan's conduct—spurred by his mother's request and unconnected to any aspect of the campaign, and carried out in a straightforward manner without any displaying of the sign—do not imbue his conduct with communicative quality. *See Tenafly Eruv*, 309 F.3d at 160.

Heffernan's conduct cannot be considered expressive under any of the applicable tests. There is no genuine factual issue for trial as to the expressive nature of these acts.

3. Perceived First Amendment speech or expression

I address an argument implicit in Heffernan's papers: that there is a viable First Amendment claim when an employer has retaliated against an employee based on the employer's mistaken *belief* that the employee spoke or otherwise expressed himself.

The United States Court of Appeals for the Third Circuit has ruled out such a theory. A "perceived support" theory of recovery "cannot form the basis of a First Amendment retaliation claim." *Ambrose v. Twp. of Robinson*, 303 F.3d 488, 495 (3d Cir. 2002). *See also Fogarty v. Boles*, 121 F.3d 886, 890 (3d Cir. 1997).

In *Ambrose*, the plaintiff, a police officer, was suspended, allegedly in retaliation for First Amendment activities. The plaintiffs primary retaliation claim was based on freedom of speech: plaintiff had allegedly drafted an affidavit in support of a fellow employee's lawsuit against the department. The Court of Appeals found insufficient evidence, however, that the defendant even knew of the affidavit's existence when it suspended the plaintiff.

That brought to the fore the plaintiff's "alternative theory" that the defendant suspended him because it perceived that he had expressed himself in support of the other officer. Those allegations were murkier. The plaintiff had allegedly entered a locked area of a municipal building after business hours, and had

failed to report his movements on his activity sheets. Plaintiff was accused of going there to photocopy documents in furtherance of his fellow officer's lawsuit. Plaintiff, however, denied this; his explanation was that he had gone there only to copy official forms, because his department's copiers were of poor quality. 303 F.3d at 490–492.

Plaintiff thus asserted that he had been suspended because his employer *incorrectly believed* he was copying papers in support of his coworker's lawsuit. The Third Circuit rejected that "perceived support" theory. In the Court's view, actual First Amendment expression is a prerequisite for a free-speech retaliation claim; an employer cannot retaliate for protected conduct unless there was protected conduct in the first place. *Id.* at 494–496 ("The problem here, as in *Fogarty*, is that there is no protected conduct.") (citing *Fogarty*, 121 F.3d at 890).[6] Thus the absence of actual, protected First Amendment speech or expression by the plaintiff proved fatal to any First Amendment claim.

What remained, said the Third Circuit, was a claim that the plaintiff was fired arbitrarily or by mistake. Such facts might give rise to an employment-law claim of some kind, but not to a constitutional retaliation claim. As held in *Fogarty*, *supra*, the court "ha[s] never held that it is a violation of the

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[6] *Fogarty* in turn cited *Barkoo v. Melby*, 901 F.2d 613 (7th Cir. 1990). There, a plaintiff was fired based on her employer's mistaken belief that she was behind certain critical newspaper articles. The Seventh Circuit held that there was "no authority for the proposition that her free speech rights are deprived in violation of § 1983 when the speech at issue admittedly never occurred." *Id.* at 619.

Constitution for a government employer to discharge an employee based on substantively incorrect information." *See id.* (quoting *Fogarty*, 121 F.3d at 890 (quoting *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994))).

Under the law of this Circuit, there can be no retaliation claim based on an employer's mere perception that the plaintiff has engaged in protected speech or expression. By his own account, Heffernan did not speak or otherwise express himself in support of Spagnola's campaign; he alleges that Defendants retaliated because the incorrectly *perceived* that he had done so. Under Third Circuit law, there is no such "perceived support" claim.

4. Does Heffernan have a claim for aiding and abetting speech?

Heffernan also argues that he is entitled to First Amendment protection for having aided and abetted the protected speech of his mother, who did intend to post the yard sign in support of Spagnola's campaign. (Pltf's Br. Opp. Dfd.'s Mot. for Summ. J. at 25–27). The only case cited by Heffernan is from the Seventh Circuit, and there is no indication that the United States Court of Appeals for the Third Circuit would adopt the same rule.

In *Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933 (7th Cir. 2004), the Seventh Circuit, in a footnote, approved a district court's holding that there may be First Amendment protection for a person's participation "as an aider and a better" of another person's protected speech. *Id.* at 938 n. 1. There, plaintiff, a laborer, had been terminated for

insubordination after his employer, the town, learned that he assisted in the posting of a flyer criticizing the town's superintendent of utilities and calling for new leadership. *Id.* at 936–37 The flyer, signed 'concerned resident,' was drafted by another resident, typed by plaintiff at the other resident's direction, and then posted in a local grocery store (plaintiff knew this would occur, but did not post it himself). *Id.* The Seventh Circuit agreed with the United States District Court for the Northern District of Indiana that the plaintiff's failure to speak personally did not necessarily bar his claim.

The Seventh Circuit found this case to be "a far cry from" *Fogarty, supra*, because the plaintiff—unlike the plaintiff in *Fogarty*, or Heffernan here—did not deny that he expressed himself. It was critical to the Seventh Circuit that "[plaintiff's] participation was not in the nature of a disinterested typist, but as an aider and abetter." *Id.* at 938 n. 1. As the district court had noted, "Plaintiff, while not composing the flyer, played a significant role in its publication. Further, plaintiffs termination for insubordination was triggered by his involvement with the flyer regardless of whether plaintiff composed the flyer or was merely Reese's instrument in drafting the document." *Gazarkiewicz*, 264 F. Supp. 2d 735, 740–41, 744 (N.D. Ind. 2003). In concluding that this involvement "constitute[d] speech," neither the district court nor the Seventh Circuit cited any controlling prior authority. *See id.*; 359 F.3d at 938 n. 1.

Adoption of the rule in *Gazarkiewicz*, which has not been adopted elsewhere, would, at the very least, represent a significant expansion of the Third Circuit rule. To the extent it relied on the fact of termi-

nation, irrespective of whether the plaintiff expressed himself at all, it would directly contradict *Ambrose* and *Fogarty*. And whatever the merits of such an expansion, it would not be appropriate on the facts of this case. The evidence here does not suggest that Heffernan played any role in the production of the sign, that he intended to adopt its message as his own, or that he intended to act even as the passive "instrument" of the Spagnola campaign when he delivered the sign to his mother.

The Seventh Circuit itself, analyzing the facts of that case, found it to be a "far cry" from *Fogarty*, and ruled on that basis. I agree. Heffernan's case, in my view, is controlled by *Fogarty* and *Ambrose*. Under the controlling law, then, there is no material issue of issue of fact for trial regarding "aiding and abetting" of speech.

In sum, then, applying governing Third Circuit law, I find that there is no genuine issue of fact as to the crucial material issue: whether Heffernan engaged in protected speech or expressive activity. I also find that his aiding and abetting claim is unsupported by the facts or the law. I will grant summary judgment to Defendants, and deny it to Plaintiff, on the claim of retaliation for exercise of the First Amendment right to free speech.

C. Freedom of Association Claim

1. Is a freedom of association claim properly before the Court?

Heffernan also claims that Defendants retaliated against him because he exercised his First Amendment right to freedom of association. Judge Sheridan

held a jury trial on that issue and entered judgment for Plaintiff. Later, after Judge Sheridan granted a new trial, Judge Cavanaugh entered summary judgment for Defendants, based solely on a finding that Heffernan did not engage in protected speech. Judge Cavanaugh's ruling did not, however, touch on the freedom-of-association issue. The Third Circuit, reversing and remanding, directed this district court to determine whether a freedom of association claim is properly before this Court.

The Complaint is of course the starting point. The Complaint asserts that "this action is brought pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments of the United States Constitution." (Complaint at ¶ 2 (Doc. No. 1)). Count I (the only count now pending) alleges that Defendants "deprived Heffernan of the privileges and immunities secured to him by the First and Fourteenth Amendments of the United States Constitution and, in particular, his right to hold employment without infringement of his First Amendment right to freedom of speech." (*Id.* at ¶ 40). The Complaint further alleges that Defendants "transferred Heffernan in order to deny Heffernan his First Amendment right to free speech." (*Id.* at ¶ 41). The Complaint does not allege or even suggest that Heffernan supported or affiliated himself with the Spagnola campaign. (*See id.* at ¶¶ 11–42). It does allege, however, that two of Heffernan's superiors in the police department, Papagni and Fraher, *told Heffernan* that he was being transferred "because of his political affiliation." (*Id.* at ¶ 28). That allegation, however indefinitely, at least suggests a freedom-of-association claim.

Heffernan's Trial Brief states that Defendants violated Plaintiff's right to freedom of association, but does not elaborate factually. (Trial Brief at II.B (ECF No. 41)). A motion *in limine* filed by Heffernan alludes to a freedom-of-association claim, but in a confusing manner. (ECF No. 39 at II.C). One subsection of the brief is titled "Freedom of Association," which seems clear enough. But that subsection is contained within a section headlined "Heffernan's *Speech* is Protected by the First Amendment." (*Id.* (emphasis added)). As in the Trial Brief, no factual basis is stated. From the case law cited, however, it might be inferred that Heffernan was asserting a freedom-of-association claim. (*Id.*).

The Final Pretrial Order invokes the First Amendment generally, but does not invoke freedom of association with specificity. The Order states that Heffernan's issues are, *inter alia*: "Whether Defendants ... deprived Heffernan of the privileges and immunities secured to him by the First and Fourteenth Amendments ... in particular, his right to hold employment without infringement of his First Amendment right to freedom of speech"; and "Whether Heffernan was demoted and transferred in direct retaliation for his First Amendment Rights." (Final Pretrial Order (ECF 53–1) at p. 43).

It was based on a broad reading of the Pretrial Order that Judge Sheridan permitted the freedom-of-association claim to go forward. He ruled that "[t]he final pretrial order set up the issue with regard to association and speech ... [and] both parties knew the scope of the issue[s]." (Lockman Cert. Ex. BB at A271). At the outset of trial, Defendants expressed surprise at this. (*Id.* at A270). After trial,

they appealed the judgment on the basis of Judge Sheridan's having allowed Heffernan "to proceed on a First Amendment freedom of association claim, when no such claim was pled in Plaintiffs Complaint or within the final pre-trial order." (ECF No. 83). Now, Defendants continue to argue that Heffernan did not properly raise a freedom of association claim. And they argue that they never received 'fair notice' of such a claim in the Complaint, as required by Fed.R.Civ.P. 8.

Examining the foregoing procedural history, I find some indications that Heffernan, when he referred generally to "the First Amendment," intended to include both freedom-of-speech and freedom-of-association theories. The Complaint at least refers to Heffernan's political affiliation as perceived by his superiors. And, as stated above, freedom of association was asserted, however briefly, in the Plaintiffs trial brief and pretrial motions in limine. True, Heffernan could and should have been far clearer. Before trial, Rule 15(a) would have permitted him to resolve all ambiguity by amending his Complaint. He did not. At or even after trial, Rule 15(b) would have permitted an amendment based on an objection, or to conform the complaint to issues that were tried by express or implied consent.[7] Again, Heffernan made no such motion.

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[7] (b) Amendments During and After Trial.

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence

If the tortuous procedural history of this matter were a film, we could freeze the frame at one point or another and find, from that viewpoint, that Defendants seem to have a valid procedural point. I must, however, view the case from the perspective of today. This matter is once again at the "pretrial" stage, despite the Court's having once tried the case to judgment for Plaintiff, and once having entered summary judgment for Defendants. Now, after two reassignments, a retrial, and an appeal, this Court has again been asked to decide upon what issues the case should go forward.

From that forward-looking perspective, I will permit the assertion of a freedom-of-association theory, in addition to the freedom-of-speech theory. Such a liberal approach is in the spirit of Federal Rule of Civil Procedure 1, which discourages the forfeiture of issues based on technicalities of pleading, and Rule 15, which permits free amendment of pleadings before trial. I see no particular potential for prejudice to Defendants. Trial, if it were to occur, would occur some months in the future. The facts have been fully explored in discovery. These alterna-

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would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Fed.R.Civ.P. 15(b).

tive legal theories are just that: different legal lenses through which to view the same fairly simple set of facts. This case was, after all, tried and won before Judge Sheridan on a freedom-of-association theory. At this point, Defendants have "unbelievably clear notice" that plaintiff intends to assert a freedom-of-association claim.[8] I will therefore permit that claim to proceed.

2. The Merits of the Freedom–of–Association Claim

Two basic freedom-of-association rights, if exercised, can give rise to a retaliation claim. (*See* Dfd's Br. in Supp. of Mot. for Summ. J. at pp. 17–18 (ECF No. 189–1)). They are: 1) the right to associate with groups engaged in expressive activity or 2) the right to maintain a political affiliation. *See Ferraioli v. City of Hackensack Police Dep't*, 2010 WL 421098 at *6, 2010 U.S. Dist. LEXIS 8527 at *22 (D.N.J. Feb. 2, 2010). In this case, there is no meaningful distinction between the two. The only claimed "group" is the Spagnola political campaign, and the only "expressive activity" the furthering of Spagnola's political message. Thus the alleged retaliation can only have occurred in response to Heffernan's (a) having affiliated himself with the Spagnola political organization, or (b) having been perceived to have done so.[9]

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[8] *See* Pltf's Br. Opp. Summ. J. at pp. 30–31. Plaintiffs are here quoting the wry observation of District Judge Jed S. Rakoff, who sat by designation on the Third Circuit panel that heard Heffernan's appeal from Judge Cavanaugh's summary judgment ruling.

[9] To put it another way, there is no doubt that the Spagnola campaign was a political organization, and that an affiliation with the campaign might constitute a political affiliation for

I consider first the "in-fact" claim, and then the "perception" claim.

a. Actual political association

Heffernan never pled or otherwise asserted that he had any political affiliation with Spagnola *in fact*. The Complaint alleges only that Heffernan "had a close personal relationship with Spagnola." (ECF No. 1 at ¶ 15). It states that Heffernan's "mother supported Spagnola" (*id.* at ¶ 18), but that Heffernan himself "was not eligible to vote in the 2006 Paterson mayoral election" because he was not a resident. (*Id.* at ¶ 16). Finally, the Complaint alleges that when Heffernan was demoted, *his superiors said* it was "because of his political affiliation to Spagnola." (*Id.* at 128). That paragraph, however, does not allege that Heffernan did hold any particular political beliefs or that he *in fact* politically affiliated himself

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purposes of a First Amendment freedom-of-association claim. *Ferraioli* illustrates the political/nonpolitical distinction. There, Judge Chesler made clear that although "political affiliation" is not "limited to affiliation with a political party" and includes causes, ideas, and candidates, such an affiliation must "implicate[ ] the furtherance of political views." *Id.* at *7, 2010 U.S. Dist. LEXIS 8527 at *24 (citing *Aiellos v. Zisa*, 2009 WL 3424190, *7, 2009 U.S. Dist. LEXIS 97542 at *21 (D.N.J. Oct. 20, 2009) (Martini, D.J.)). In *Ferraioli*, although plaintiffs alleged retaliation for exercise of their "right to free speech and ... right to vote," they were referring to a labor union election, not a political campaign. *Id.* at *4, *5, 2010 U.S. Dist. LEXIS 8527 at *16, *18. Thus their claim did not directly pertain to any *political* belief or cause. *Id.* at *7–8, 2010 U.S. Dist. LEXIS 8527 at *24–26. Judge Chesler therefore rejected the plaintiffs' contention that they had pled "a political affiliation."

with Spagnola. It states at most that his superiors believed this, a claim I discuss separately below.[10]

Heffernan has never testified or otherwise asserted that he actually affiliated himself with Spagnola's political organization. He now cites Goow's trial testimony that Heffernan was a "supporter" of Spagnola. (Goow's Trial Testimony, Lockman Cert. Ex. BB at A405:23; Pltf's Br. Opp. Summ. J. at p. 40). Goow's testimony, however, equivocates—and Goow confirmed that, on the day in question, Heffernan was not involved in any political activity but was merely running an errand for his mother. (*See* Goow's Trial Testimony at A406).

Most importantly, *Heffernan himself* asserted that he had no political connection to Spagnola. Any "support" consisted of passive well-wishing based on friendship. Heffernan testified at trial that "I wasn't politically involved. I was just picking up a sign for my mom." (Heffernan's Trial Testimony at A499:25–A500:l). Heffernan reiterated: "I told [Papagni] I wasn't involved in the campaign." (*Id.* at A501:11). Nothing in the record suggests that, at the time he picked up the signs, Heffernan acted from political conviction or sought to associate himself with any political group or movement. He was admittedly friendly with Spagnola, but did nothing with the intent of furthering the goals of the campaign or promoting a message. He merely picked up the sign as

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[10] Another paragraph alleges that Heffernan "was demoted in direct retaliation for his exercise of protected activities." (*Id.* at ¶ 31). This is most naturally read as referring to his free-speech claim. At any rate, it does not explicitly say anything about affiliation with a political party or campaign.

an accommodation to his ailing mother, and he has never claimed otherwise.[11] *See* pp. 9–11, *supra* (citing the record).

In short, there is not a material issue of fact as to whether Heffernan in fact affiliated himself with the Spagnola political campaign. Heffernan himself denied it, and—the case having been tried to conclusion—there is an unusually well-developed record on the point. I therefore grant Defendants' motion for summary judgment as to this theory.

b. Perceived political association

What Heffernan did repeatedly say (and others corroborated him) was that Defendants demoted him because they mistakenly believed that his actions betokened an affiliation with the Spagnola political organization. (*E.g.*, Heffernan's Trial Testimony, Lockman Cert. Ex. S at A201, 153:1–6; Pltf's Br. in Opp. at p. 45). In short, his superiors wrongly per-

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[11] Contrary to Heffernan's argument, then, this case is nothing like *Perez v. Cucci*, 725 F. Supp. 209, 238–239 (D.N.J. 1989). (Pltf's Br. Opp. Mot. for Summ. J. at pp. 45–46). In *Perez*, Judge Ackerman addressed a patronage system in the Jersey City Police Department, under which promotions and demotions were handed out in accordance with a police officer's personal political affiliations. There, the plaintiff "openly and actively supported the reelection bid of [the] then-Mayor [.] Specifically, the plaintiff attended numerous rallies and meetings. As president of the Hispanic Law Enforcement Society of Hudson County, the plaintiffs name and/or photograph appeared (1) in campaign literature and political advertisements ... and (2) in paid political advertisements in the Jersey Journal ..." 725 F. Supp. at 218. The Court found that, after a new mayor took over, the plaintiff suffered retaliation based on his political affiliations.

ceived that Heffernan had fetched the lawn sign as part of his work for the Spagnola campaign. Heffernan invokes cases from the Sixth, First and Tenth Circuits that have recognized a freedom-of-association claim where an employer demotes or fires an employee in retaliation for a political affiliation that is only perceived, not actual. Under the current law of this Circuit, however, adverse action based on such a mistaken belief does not constitute First Amendment retaliation, as a matter of law.

As established above, the law in this Circuit is clear, at least as to a First Amendment freedom-of-speech claim. No First Amendment claim arises from retaliation based on an employer's mistaken belief that the employee engaged in protected speech. *Ambrose*, 303 F.3d at 496; *Fogarty*, 121 F.3d at 891; *Myers v. County of Somerset*, 515 F. Supp. 2d 492, 501 (D.N.J. 2007). That requirement of actual speech or actual expression leaves no room for a perceived-support claim. *See* pp. 12–13, *supra*.

It perhaps is an open issue whether the *Ambrose* holding extends to freedom of association, as well as freedom of speech. For these purposes, however, the distinction between a freedom-of-speech retaliation claim and a freedom-of-association retaliation claim does not seem significant. *Ambrose* articulated a general rationale—no First Amendment retaliation without First Amendment conduct—that would apply equally to both. Third Circuit case law articulates no principled basis for treating them differently. Absent such a statement, a proper respect for the letter and spirit of the *Ambrose* holding requires that I apply it in the closely related context of freedom of association. Unless the Third Circuit limits it or re-

considers it *en banc*, I am bound to follow the lead of *Ambrose*.

That said, the United States Court of Appeals for the Sixth Circuit has clearly endorsed a perceived-support theory as a basis for a freedom-of-association retaliation claim. *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012). The issue in *Dye* was "whether individuals claiming to have been retaliated against because of their political affiliation must show that they were actually affiliated with the political party or candidate at issue. We believe that they do not." *Id.* at 292. There, four stewards of the Michigan Racing Commission alleged that they had suffered retaliation because their superiors "attributed a political affiliation" to them. *Id.* at 309. There was evidence that the Commissioner, appointed by a Democratic governor, stripped the stewards of benefits because she assumed (wrongly, said the stewards) that they were affiliated with the Republican Party and the governor's Republican challenger. *Id.* at 300–302. The Sixth Circuit held that "[a]n employer that acts on such assumptions regarding the affiliation of her employees should not escape liability because her assumptions happened to be faulty." *Id.* at 302. The Court of Appeals reversed the district court's award of summary judgment to the defendants, because "retaliation based on perceived political affiliation is actionable." *Id.* at 299–300.

If *Dye* had distinguished *Ambrose* and drawn a principled distinction between freedom of speech and freedom of association for these purposes, I could perhaps consider it as persuasive authority. But it did not. *Dye* rejected the *Ambrose* principle categori-

cally and explicitly disapproved the reasoning of the Third Circuit.[12] To state the obvious, *Dye*'s rationale—that the Third Circuit was wrong—is not one that is available to me, a district judge sitting within the Third Circuit.

More briefly, I will examine a First Circuit case and a Tenth Circuit case upon which *Dye* relied. *Dye* treated them as strong authority for the perceived-support rationale. I am less certain.

The United States Court of Appeals for the First Circuit dropped a tantalizing hint in *Welch v. Ciampa*, 542 F.3d 927, 938–39 (1st Cir. 2008), but ultimately *Welch* provides no basis for me to distinguish *Ambrose*. The *Welch* plaintiff, a police officer, remained silent during a recall election in which his bosses took a keen interest. The First Circuit found, without extended discussion, that there had been no speech, and therefore rejected a free-speech retaliation claim. *Welch* does not cite *Ambrose*, but this holding, as to freedom of speech, is consistent with *Ambrose*.

In the alternative, the *Welch* plaintiff asserted a freedom-of-association claim. That is, the plaintiff

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[12] In particular, the Sixth Circuit stated that *Ambrose* had misapplied or overextended the Supreme Court's holding in *Waters v. Churchill*, *supra*. According to the Sixth Circuit, *Waters* was talking about due process standards, not a First Amendment retaliation claim. 702 F.3d at 300 (citing *Waters*, 511 U.S. at 679, 114 S.Ct. 1878; *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1189 n. 9 (6th Cir. 1995) (interpreting *Waters*)). Dye also noted that *Ambrose* and other cases had rejected the perceived-support rationale in the context of free speech, not freedom of association. *Dye* did not suggest any basis for disparate treatment of the two issues, but stated that it did not need to reach the free speech issue. 702 F.3d at 299 n. 5.

alleged that the defendants retaliated against him because he remained neutral and refused to "participate in any campaign activities" in the recall election. *Id.* at 934 ("Welch decided not to participate in any campaign activities related to the recall. His decision to remain neutral was regarded as a betrayal...."). The First Circuit upheld that freedom-of-association claim. I do not think, however, that *Welch* can be read to fully support the *Dye* holding. Nor does it help establish that the reasoning of *Ambrose* should be confined to freedom-of-speech claims.

To my way of thinking, the holding of *Welch* does not rest on the notion that plaintiffs neutral stance gave rise to a mistaken perception that he belonged to a hostile faction. Rather, *Welch*'s holding is grounded in the well-established proposition that, under the freedom-of-association clause, *refusal to participate in a political campaign is itself protected conduct*: "The freedom not to support a candidate or cause is integral to the freedom of association and freedom of political expression that are protected by the First Amendment." *Id.* at 939 (citing, *e.g.*, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)). Indeed, that view of the freedom-of-association clause is in accord with Third Circuit law. *See Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 272 (3d Cir. 2007) ("[T]he right not to have allegiance to the official or party in power itself is protected under the First Amendment, irrespective of whether an employee is actively affiliated with an opposing candidate or party.").

Heffernan has never claimed, however, that he was punished for remaining neutral or for refusing to campaign for a candidate favored by his superiors.

He has maintained throughout that he was punished because his superiors incorrectly thought he was campaigning for Spagnola, activity that would have been inappropriate for a public employee. Thus to deny his claim would not be inconsistent with the holding of *Welch* as I understand it.

Welch did not, in so many words, discuss or analyze a perceived-support theory. *Dye* did, however, quote some language from *Welch* that could be read to support such a theory. I think this may have pushed *Welch* too far. Based on the principle that freedom of association encompasses the right not to be punished for declining to join a political campaign or movement, the *Welch* court stated that "active support for a campaign or cause may help the plaintiff meet her evidentiary burden of showing that the adverse employment decision was substantially motivated by her political affiliation.... But neither active campaigning for a competing party nor vocal opposition to the defendant's political persuasion are required." 542 F.3d at 939. So far, so good; the freedom-of-association clause protects the right to refrain from a particular association. *Welch* then stated that "[w]hether Welch actually affiliated himself with the anti-recall camp [was] not dispositive *since the pro-recall camp attributed to him that affiliation*." *Id.* (emphasis added). I would not lightly infer a perceived-support theory from this stray reference. I find it more appropriate to treat this as dictum, for two reasons. First, the point is overdetermined. A plaintiff's failure to actually affiliate with a political movement or campaign is not dispositive, irrespective of any employer's perception, because the First Amendment protects such non-affiliation. Second, it

appears that the Court was speaking in the context of proving defendant's *motivation*: specifically, that the alleged retaliation "was substantially motivated," *id.*, by plaintiff's exercise of First Amendment rights. The discussions of the First Amendment's coverage and the required intent may simply have overlapped.

The United States Court of Appeals for the Tenth Circuit considered a variant scenario in *Gann v. Cline*, 519 F.3d 1090 (10th Cir. 2008). There, adverse action was taken against an employee who allegedly failed to maintain the favored political affiliation. Focusing on the employer's motivations, rather than the employee's true beliefs, the court held: "[T]he only relevant consideration is the impetus for the elected official's employment decision vis-á-vis the plaintiff, i.e., whether the elected official prefers to hire those who support or affiliate with him and terminate those who do not." *Id.* at 1094. Here, too, the court grounded its analysis in Supreme Court authority for the proposition that "Discrimination based on political non-affiliation is just as actionable as discrimination based on political affiliation." *Id.* at 1093 (citing *Rutan*, 497 U.S. at 64, 110 S.Ct. 2729; *Branti v. Finkel*, 445 U.S. 507, 517, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod v. Burns*, 427 U.S. 347, 350, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). Although relied on by *Dye*, *Gann* did not in fact articulate a perceived support theory.

There is a certain logic to *Dye*. Assume that State Employer A retaliates because Employee is a Democrat, or a Republican. Obviously there is a First Amendment freedom-of-association claim to be made. If State Employer B does the same thing, with

the same unconstitutional retaliatory motive, *and is wrong to boot*, should it really be placed in a *more* favorable position?[13] Might the Third Circuit approach permit employers to intimidate employees into avoiding anything that might even be *mis* construed as political speech or affiliation? The *Dye* approach seems designed to afford the First Amendment some breathing space. It must be remembered, however, (a) that a First Amendment retaliation claim is not a comprehensive remedy for all employment-related unfairness; and (b) that the context is public employment, where the freedom to engage in political speech and partisan activity can permissibly be curbed.

Nothing about this out-of-Circuit case law persuades me that I am free to depart from *Ambrose* in the freedom-of-association context. The language and logic of *Ambrose* or *Fogarty* do not suggest that the Third Circuit would adopt a different rule for freedom-of-association cases. Accordingly, the letter and spirit of the *Ambrose* holding compel me to reject a perceived-support theory here. Heffernan's alternative theory that Defendants were motivated by a mistaken perception that Heffernan had politically affiliated himself with the Spagnola campaign is

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[13] And if the employer must be correct about the employee's political affiliation, how accurate must its perception be? Thus, for example, an employer might accurately perceive that an employee is a Democrat or a Republican, but inaccurately assume that the employee holds certain other beliefs as a result. It may be harder than it appears to get away from the employer's perceptions as a basis for determining whether an employee is in fact affiliated with "the enemy." Political prejudices can be irrational, but no less harmful for that.

barred by the *Ambrose* principle that a First Amendment retaliation claim must be premised on an actual exercise of First Amendment rights. As a matter of law, Heffernan's perceived-support allegations do not give rise to a claim of First Amendment retaliation.

Construing the entire record in the light most favorable to Heffernan, I find that there is no genuine issue of material fact as to Heffernan's freedom of association claim, and that defendants are entitled to judgment as a matter of law. *See generally* Fed.R.Civ.P. 56(c). Defendants' motion for summary judgment is therefore granted as to Heffernan's freedom-of-association claim.

D. Summary Judgment Motions of the City and Mayor Torres

Defendants have asserted additional grounds for summary judgment specific to the City of Paterson and Mayor Torres. These, however, are moot in light of my disposition of the other issues.

The City of Paterson notes that it cannot be held liable under Section 1983 by virtue of *respondeat superior*. Under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a plaintiff who wishes to hold a municipality liable must demonstrate that the constitutional violation occurred pursuant to an official municipal policy or custom. *Id.*; *Bielevicz v. Dubinon*, 915 F.2d 845, 849–50 (3d Cir.1990). (Dfd's Br. Supp. Mot. Summ. J. at 52–56).

Mayor Torres denies that he engaged in any conduct which could make him liable under Section

1983. Chief Wittig, he says, was the sole decisionmaker, there is no evidence to back up Heffernan's allegation that Torres instructed Wittig to demote or transfer him. (Dfd's Br. Supp. Mot. Summ. J. at 56–58)

Plaintiff responds that his allegations against Chief Wittig and Mayor Torres establish a municipal policy, and that his evidence is sufficient to create an issue as to Torre's personal involvement. (Pltf's Br. Opp. Dfd's Mot. Summ. J. at 52–61). *See also Johnson v. Zagori*, 2011 WL 2634044, *3, 2011 U.S. Dist. LEXIS 71267, *7–8 (D.N.J. June 30, 2011) (citing *McKenna v. City of Philadelphia*, 582 F.3d 447, 460 (3d Cir. 2009); *Argueta v. United States Immigration & Customs Enforcement*, 643 F.3d 60 (3d Cir. 2011)).

Because I have found no underlying First Amendment violation, I need not reach the issue of whether Torres and the City would share liability for it. As to these issues, the Defendants' summary judgment motions are dismissed as moot.

CONCLUSION

For the reasons stated above, the motion for summary judgment of Police Chief James Wittig is **GRANTED**; the motions for summary judgment of Mayor Jose Torres and City of Paterson are **GRANTED IN PART and DENIED IN PART AS MOOT**. Heffernan's Motion for Partial Summary Judgment is **DENIED**. The complaint will be **DISMISSED** in its entirety. An appropriate order will follow.

APPENDIX C

United States District Court
for the District of New Jersey

JEFFREY HEFFERNAN, Plaintiff

v.

CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTIG, and POLICE DIRECTOR MICHAEL WALKER, Defendants.

Civ. No. 06-3882 (KM)

ORDER

THIS MATTER having been opened to the Court, pursuant to Fed. R. Civ. P 56, by Defendant Police Chief James Wittig [ECF No. 186, 188], Defendant Mayor Jose Torres [ECF No. 185, 187], and Defendant City of Paterson [ECF No. 189], through their counsel Lite DePalma Greenberg LLC; Potters & Della Pietra LLP; Dwyer, Connell & Lisbona; Chasan, Leyner & Lamparello, and McElroy, Deutsch, Mulvaney & Carpenter, who submitted a joint brief in support of Defendants' motions [ECF No. 189-1]; and by Plaintiff, through his counsel Mark B. Frost & Associates, on a simultaneous motion for partial summary judgment [ECF No. 190]; and the Plaintiff having submitted papers in opposition to the Defendants' Motion [ECF No. 197]; and the Defendant having submitted papers in opposition to the Plaintiff's motion [ECF No. 196]; and the parties having replied to the each other's opposition papers [ECF Nos. 200, 201]; and the Court having considered the papers, pursuant to Federal Rule of Civil Procedure

78(b); for the reasons stated in the opinion filed on this date, and for good cause shown;

IT IS this 5th day of March, 2014,

ORDERED that the motion for summary judgment of Defendant Police Chief James Wittig is GRANTED; and it is further

ORDERED that the motions for summary judgment of Defendants Mayor Jose Torres and City of Paterson are GRANTED IN PART, but are DENIED IN PART to the extent they seek summary judgment on grounds pertaining to them individually which have been rendered MOOT; and it is further

ORDERED that Plaintiff's Motion for partial summary judgment is DENIED; and it is further

ORDERED that the Complaint be and hereby is DISMISSED WITH PREJUDICE.

/s/ Hon. Kevin McNulty, U.S.D.J.

APPENDIX D

United States Court of Appeals,
Third Circuit.

Jeffrey J. HEFFERNAN, Appellant

v.

CITY OF PATERSON; Mayor Jose Torres; Police Chief James Wittig; Police Director Michael Walker.

No. 11–2843

Argued June 28, 2012

Filed: July 16, 2012.

On Appeal from the United States District Court for the District of New Jersey, District Court No. 2–06–cv–03882, District Judge: The Honorable Dennis M. Cavanaugh.

Alexandra M. Antoniou, Mark B. Frost (Argued), Ryan M. Lockman, Emily K. Murbarger, Mark B. Frost & Associates, Philadelphia, PA, Gregg L. Zeff, Mount Laurel, NJ, for Appellant.

William T. Connell, Albert C. Lisbona, Dwyer, Connell & Lisbona, Michele L. DeLuca, Gary Potters, Potters & Della Peitra, Fairfield, NJ, Mitzy R. Galis–Menendez, Chasan, Leyner & Lamparello, Secaucus, NJ, Joseph Michael Morris, III, Thomas P Scrivo, McElroy, Deutsch, Mulvaney & Carpenter, Newark, NJ, Victor A. Afanador (Argued), Lite, De Palma, Greenberg, Newark, NJ, for Appellees.

Before: SMITH and FISHER, Circuit Judges and RAKOFF, Senior District Judge.*

SMITH, Circuit Judge.

Plaintiff Jeffrey Heffernan appeals from summary judgment entered against him in his First Amendment civil rights case. We will reverse.

Heffernan is a police officer working for the City of Paterson, New Jersey. During the Paterson mayoral election of 2006, Heffernan was asked by his mother to obtain a yard sign for Lawrence Spagnola, a long-time Heffernan family friend and Defendant Mayor Jose Torres' principal opponent. Heffernan was off-duty at the time. Heffernan met with Councilman Aslon Goow, Spagnola's campaign manager, and obtained a sign. When Defendant Police Chief James Wittig learned of this, Heffernan was abruptly transferred out of his position in the Police Chief's office, stripped of his title of detective, and reassigned to a series of allegedly punitive positions.[1] Defendant Wittig admitted that this action was in direct response to Heffernan's alleged political involvement. Defendants Wittig, Torres, and other witnesses concede that off-duty police officers in Paterson are free to engage in political activity. But Wittig claims that an unwritten policy against politi-

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* The Honorable Jed S. Rakoff, Senior District Judge for the United States District Court for the Southern District of New York, sitting by designation.

[1] Plaintiff also alleges that as a result of his actions, his weapons—both duty and personal—were taken from him, and that he was improperly denied a promotion to sergeant.

cal involvement existed for officers working in the Chief's office.

This case comes to us after a complicated and highly unusual history in the District Court. Heffernan filed this case in the District of New Jersey, seeking compensatory and punitive damages for civil rights violations under 42 U.S.C. § 1983. The parties eventually filed cross-motions for summary judgment.[2] These were denied by District Judge Peter G. Sheridan, and the case proceeded to trial. Despite First Amendment Free Speech arguments being raised repeatedly in pretrial filings, the case went to trial solely on First Amendment Free Association grounds. The jury was charged solely on Free Association and returned a verdict for Heffernan of $105,000 in compensatory and punitive damages.

Up until that point, this case was a relatively straightforward civil rights action. But several months after the jury rendered a verdict in favor of Heffernan, Judge Sheridan retroactively recused himself due to what he perceived as a conflict of interest. The case was set for retrial and assigned to District Judge Dennis M. Cavanaugh. The parties agreed that Judge Cavanaugh should revisit their pretrial motions, including the cross-motions for summary judgment. But each party qualified this agreement. Defendants asked for oral argument on the motions. And Plaintiff asked for the opportunity to file an opposition to Defendants' motion and to

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[2] Heffernan's motion was labeled as a "Motion in Limine," but we believe it is more properly viewed as a Motion for Partial Summary Judgment. The substance of the motion is the same regardless.

supplement the record with evidence obtained in the jury trial. The parties had not been permitted to file oppositions in the original briefing on the motions.

Though Judge Cavanaugh initially indicated that he would not revisit dispositive motions, he eventually agreed to do so. He did deny the request for additional briefing. Judge Cavanaugh later granted Defendants' motion and entered judgment in their favor. He concluded that because Heffernan had repeatedly indicated that he was retrieving the sign for his mother and that he was not campaigning for Spagnola, Heffernan was not engaging in speech and was not entitled to the protections of the Free Speech Clause of the First Amendment. Judge Cavanaugh's opinion made no mention of Heffernan's Free Association claim, despite Heffernan having received a jury verdict in his favor on that claim.

We first consider an underlying procedural matter. Heffernan contends that the District Court erred in denying him permission to file an opposition to Defendants' summary judgment motion. Our standard of review for such a procedural matter is abuse of discretion. *See, e.g., Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 220 (3d Cir. 2011) (abuse-of-discretion review for denial of leave to amend); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 349 n. 26 (3d Cir. 2010) (abuse-of-discretion review for denial of leave to intervene); *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1191–92 (10th Cir. 2006) ("Whether a non-moving party has had an opportunity to respond to a moving party's reply brief at the summary judgment stage is a supervision of litigation' question that we review for abuse of discretion."). We conclude that the District Court abused

its discretion by barring the Plaintiff from filing an opposition here.

It is extremely unusual in our experience for a District Court to deny permission to file opposition briefs, particularly on a dispositive motion. It is difficult to see how a contested summary judgment motion could ever be decided without opposition briefing, unless the parties agreed to the facts. Issues of fact are quite often key disputes on summary judgment, with the movant asserting that facts supporting its motion cannot be genuinely disputed, and the non-movant responding that certain facts can indeed be genuinely disputed. *See* Fed.R.Civ.P 56(c); D.N.J. L. Civ. R. 56.1(a). The parties will often contest materiality and supporting evidence in a similar manner. *See* Fed.R.Civ.P 56(c)(2) (permitting challenges to supporting evidence). The local rules for the District of New Jersey contemplate that the parties will file both an opposition and a reply to any summary judgment motion. *See* D.N.J. L. Civ. R. 56.1(a). The District Court gave no explanation for its departure from the prescribed practice.

The District Court may have thought that barring additional briefing was justified by Judge Sheridan's refusal to permit oppositions and replies when the motions were initially filed. That conclusion assumes that Judge Sheridan's decision was itself justified. But even if it were, Plaintiff specifically requested additional briefing as a condition of his consent to have the District Court reexamine the summary judgment motion.

Plaintiff had good reason to ask for additional briefing, as the jury trial produced numerous additional facts, all of which should have been considered

in re-examining the motion for summary judgment. Defendants contend that the record of the jury trial should not be considered on summary judgment, asserting that the effect of Judge Sheridan's recusal is to turn back the clock to the summary judgment stage and pretend the jury trial never happened. Their source for this dubious proposition is unclear. They cite no federal precedent supporting it. Our cases emphasize the importance of notice and opportunity to respond, and a party has not had a full opportunity to respond if it is unreasonably prevented from offering all relevant, reliable evidence. *See, e.g.*, *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 223 (3d Cir. 2009) (requiring a party be given the "opportunity to support its position fully" before summary judgment is entered); *Davis Elliott Int'l, Inc. v. Pan Am. Container Corp.*, 705 F.2d 705, 707–08 (3d Cir. 1983) (requiring a party "be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56" (quoting *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir.1980))). Evidence obtained in a jury trial—even one involving a later recusal—is at least as reliable as other pieces of evidence, such as affidavits, that are routinely considered on summary judgment.

In *Jackson v. State of Alabama State Tenure Commission*, 405 F.3d 1276 (11th Cir. 2005), a public-employee free speech case, the Eleventh Circuit considered a fact pattern similar to the one here. Summary judgment was initially granted, but then reversed by the Eleventh Circuit, with the case remanded and tried before a jury. *See id.* at 1280. The jury verdict was then vacated because a juror had lied about her criminal history. Before the second

trial, the trial judge recused himself. *See id.* The new trial judge revisited and granted the summary judgment motion. The Eleventh Circuit affirmed. It specifically held that the district court was justified in granting a summary judgment motion that the Eleventh Circuit itself had previously denied because the district judge "had before him the transcript of the first trial[.]" *Id.* at 1285. Detailing the evidence that supported summary judgment, the Eleventh Circuit explained that "the law of the case did not preclude entry of summary judgment ... on the record as it stood at the end of the first trial." *Id.*

Given that the District Court's conclusion that Heffernan did not speak was based on pre-trial discovery alone, trial testimony that qualifies or undermines that evidence is highly relevant, and should not have been set aside by the District Court. On remand, the District Court is instructed to permit the parties to re-file their summary judgment motions with updated statements of undisputed material fact and to allow full opposition and reply briefing.

Turning to the substance of the District Court's opinion, we review a District Court's grant of summary judgment *de novo*. *See Beers–Capitol v. Whetzel*, 256 F.3d 120, 130 n. 6 (3d Cir. 2001). Summary judgment is appropriately granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P 56(a). On summary judgment, we must view the facts in the light most favorable to the nonmovant (Plaintiff Heffernan) and draw all reasonable inferences in his favor. *See Beers–Capitol*, 256 F.3d at 130 n. 6; *Big Apple BMW*,

Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). We conclude that the able District Judge erred by failing to address Heffernan's Free Association claim.

Heffernan's Free Association claim clearly appeared in his "Motion in Limine" and his Trial Brief. Judge Sheridan concluded that the Free Association claim was fairly presented and that Defendants had an opportunity to obtain discovery on it. The Free Association claim was tried and Heffernan obtained a jury verdict in his favor, specifically on Free Association. Given these facts, it was reversible error for the District Court to fail to address Heffernan's Free Association claim before entering judgment in favor of the Defendants.

Defendants assert that Heffernan did not adequately plead his Free Association claim and that—at a minimum—they should have been entitled to additional discovery before proceeding to trial on the Free Association claim. We leave these objections for consideration by the District Court. We hold solely that it was error for the District Court to enter judgment in favor of Defendants after discussing only Heffernan's Free Speech claim, considering that Heffernan had previously obtained a jury verdict on his Free Association claim. On remand, the District Court should consider the extent to which Heffernan prosecuted his Free Association claim and whether Defendants timely objected to trial of the Free Association claim. The District Court should also consider the appropriate remedy, whether it be dismissal of the Free Association claim, reopening discovery solely on Free Association, or proceeding to trial.

In light of our conclusion that the District Court's entry of judgment resulted from both procedural and substantive errors, we will reverse. We do not reach the question of the viability of Heffernan's Free Speech claim. The District Court should re-examine that claim in light of the full record and the parties' supplemental briefing.

APPENDIX E

United States District Court,
D. New Jersey

Jeffrey HEFFERNAN, Plaintiff,
v.
CITY OF PATERSON, Mayor Jose Torres, Police Chief James Witting, and Police Director Michael Walker, Defendants.

Civ. No. 06–3882 (DMC)(JAD)
May 23, 2011

DENNIS M. CAVANAUGH, District Judge.

This matter comes before the Court upon Defendants' motion for summary judgment pursuant Rule 56 of the Federal Rules of Civil Procedure and Plaintiff's motion *in limine* for this Court to find as a matter of law that Plaintiff engaged in protected speech. No oral argument was heard pursuant to Federal Rule of Civil Procedure 78. For the reasons stated below, Defendants' motion is **granted** and Plaintiff's motion is **denied as moot**.

I. *BACKGROUND*[1]

In 2006, Lawrence Spagnola ("Spagnola"), a close friend of Plaintiff's family, was running for Mayor of the City of Paterson, New Jersey against incumbent Defendant Mayor Jose Torres ("Mayor Torres"). Compl. ¶¶ 14, 15. At the time, Plaintiff was a Detective assigned to work in the office of Defendant Po-

[1] The facts in the Background section have been taken from the parties' submissions.

lice Chief James Witting ("Chief Witting"), one of Mayor Torres' political allies. Compl. ¶ 13.

Plaintiff took no position on the candidates and was ineligible to vote in the election as he was not a resident of the City of Paterson. Compl. ¶ 16. Id. Though he was not supporting Spagnola for mayor, his mother was. Afanador Certif. Ex. B, at 132:23–133:11.

On April 13, 2006, Plaintiff's mother, a Paterson resident, told Plaintiff that she wished to have a larger Spagnola campaign sign for her front lawn and asked Plaintiff to help her obtain one. Compl. ¶ 19. Accordingly later that day, Plaintiff—while off-duty—planned to meet Councilman Alson Goew, who was distributing Spagnola signs. Afanador Certif. Ex. B, at 60:13–21. While the two men were stopped chatting on a street corner, they were spotted by Officer Arsinio Sanchez, a colleague and friend of Mayor Torres. Afanador Certif Ex. B, at 62:8–24. Plaintiff believes that Officer Sanchez tipped off either Mayor Torres or Chief Witting that Plaintiff was campaigning for Spagnola and that this tip resulted in Plaintiff's demotion to the Traffic Walking Squad on April 17, 2006. *Id*; Compl. ¶¶ 21–26. Plaintiff maintains, however, that he was not campaigning for Spagnola on April 13 and that once he received the sign from Councilman Goew, he dropped it off at his mother's home, not even going so far as to post the sign in her yard. Afanador Certif. Ex. B, at 62:22–25.

II. *STANDARD OF REVIEW*

"A court reviewing a summary judgment motion must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Gaston v. U.S. Postal Serv.*, 319 Fed. Appx. 155, 157 (3d Cir. 2009). However, "[t]he judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P 56(c)(2).

Generally, "[a] party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim" at any time "until 30 days after the close of all discovery." Fed.R.Civ.P 56(b), (c). "[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Cartrett*, 477 U.S. 317, 325 (1986). "[R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* (citing Fed.R.Civ.P 56(c)).

> When a motion for summary judgment is properly made and supported, [by contrast,] an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so

> respond, summary judgment should, if appropriate, be entered against that party.

Fed.R.Civ.P 56(e)(2). If "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Indeed, "unsupported allegations in [a] memorandum and pleadings are insufficient to repe summary judgment." *See Schoch v. First Fid. Ban corporation*, 912 F.2d 654, 657 (3d Cir. 1990). Rule 56(e) permits "a party contending that there is no genuine dispute as to a specific, essential fact 'to demand at least one sworn averment of that fact before the lengthy process of litigation continues.'" *Id.* (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990)). "It is clear enough that unsworn statements of counsel in memoranda submitted to the court are even less effective in meeting the requirements of Rule 56(e) than are the unsupported allegations of the pleadings." *Schoch*, 912 F.2d at 657

III. *DISCUSSION*

Public employees may sue to enforce their First Amendment rights against retaliation by an employer if "(1) they spoke on a matter of public concern; (2) their interest in that field outweighs the government's concern with the effective and efficient fulfillment of its responsibilities to the public; (3) the speech caused the retaliation; (4) the adverse employment decision would not have occurred but for the speech." *Fogarty v. Boles*, 121 F.3d 886, 888 (3d

Cir. 1997). "'A public employee's speech involves a matter of public concern if it can 'be fairly considered as relating to any matter of political, social or other concern to the community '" *Baldassare v. New Jersey*, 250 F.3d 188, 195 (3d Cir. 2001) (quoting *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 885–86 (3d Cir. 1997)).

An essential factor for an actionable claim is that the plaintiff must have engaged in constitutionally protected speech—"in the absence of speech, there has been no constitutional violation cognizable under *section 1983* based on an asserted 'bad motive' on the part of defendant." *Fogarty*, 121 F.3d at 890; *Lombardi v. Morris Cnty. Sheriff's Dep't*, No. 04–5418(DRD), 2007 WL 1521184, at *6 (D.N.J. May 22, 2007) ("The law is clear that 'the absence of speech—in fact, its explicit disclaimer by plaintiff—is fatal to the plaintiff's claim.'" (quoting *Fogarty*, 121 F.3d at 891)). Where there has been no protected speech, "a public employee may be discharged even if the action is unfair, or the reasons 'are alleged to be mistaken or unreasonable.'" *Id.* at 889 (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)); *see also Waters v. Churchill*, 511 U.S. 661, 679 (1994) ("We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information.").

Defendants assert that summary judgment should be granted because "Plaintiff has admitted repeatedly in pleadings, depositions, and admissions that he did not hang signs or engage in any political activity during the 2006 Re–Election Campaign." Defs.' S.J. Br. 10. The Court agrees. Plaintiff's Complaint provides that he was assisting his mother in acquiring a

larger campaign sign. Compl. ¶¶ 14, 17, 19. At no point does Plaintiff allege that he was hanging signs in support of Spagnola's candidacy or that he was supporting Spagnola for mayor. In fact, in a sworn deposition, Plaintiff testified that: (1) "[He] wasn't working on the campaign, period"; (2) "[He] got [his] sign, and [he] went to [his] mother's house, dropped it off ... [and] didn't even put it up"; and (3) "[he] wasn't going to post [the sign] ... [and] didn't have tools" to put it up. Afanador Certif. Ex. B, at 61:6–7; 62: 22–25; 133:12–17. Six months after this testimony, Plaintiff disclosed during a psychological examination that "he picked up a Spagnola lawn sign only because his mother asked him to do so" and that "he took no position on the election."

Plaintiff does not refute these facts and has never claimed that he was doing anything other than transporting a sign for someone else. Therefore, the Court finds that summary judgment is appropriate because there is no genuine issue as to a material fact. In total, the statements above establish that Plaintiff never engaged in any political speech, or any speech at all. Therefore, Plaintiff has failed to state a cognizable claim under § 1983.

IV. *CONCLUSION*

For the reasons stated, Defendants' motion seeking summary judgment is **granted** and Plaintiff's *in limine* motion is **denied as moot**.

APPENDIX F

United States Court of Appeals
for the Third Circuit

No. 14-1610

JEFFREY J. HEFFERNAN, Appellant

v.

CITY OF PATERSON;
MAYOR JOSE TERRES;
POLICE CHIEF JAMES WITTIG;
POLICE DIRECTOR MICHAEL WALKER

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 2-06-cv-03882)
District Judge: Honorable Kevin McNulty

SUR PETITION FOR REHEARING

Present: McKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, COWEN, and GREENBERG, Circuit Judges[1]

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for a rehearing, and a majority of the judges of the circuit in

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[1]The votes of the Honorable Robert E. Cowen and the Honorable Morton I. Greenberg are limited to panel rehearing only.

regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Thomas I. Vanaskie
Circuit Judge

Dated: February 13, 2015

Supreme Court, U.S.
FILED
JUN 25 2015
OFFICE OF THE CLERK

No. 14-1280

In The Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTIG, AND POLICE DIRECTOR MICHAEL WALKER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED

May a public employee prevail on a retaliation claim under 42 U.S.C. Section 1983 for a deprivation of his First Amendment right to freedom of political association even though he has not in fact exercised that First Amendment right?

LIST OF PARTIES

Although petitioner has not filed and served the written notice required by Rule 12.6, Michael Walker has no interest in the outcome of the petition, all claims against him having been voluntarily dismissed. Pet. App. 15a. Counsel of Record Victor A. Afanador has served as counsel to both the City of Paterson and Police Director Michael Walker since the Complaint was filed.

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COURT RULE

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Federal Rule of Civil Procedure 15 8

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 777 F.3d 147 (3d Cir. 2015). The opinion of the district court (Pet. App. 14a-54a) is reported at 2 F. Supp. 3d 563 (D.N.J. 2014).

A prior opinion of the district court (Pet. App. 66a-71a) is not published in the Federal Supplement but is available at 2011 WL 2115664 (D.N.J. 2011), and a prior opinion of the court of appeals (Pet. App. 57a-65a) is reported at 492 Fed. Appx. 225 (3d Cir. 2012).

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2015, and a timely petition for rehearing was denied on February 13, 2015. The petition was filed on April 22, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of

> the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

In 2006, petitioner filed this 42 U.S.C. Section 1983 ("Section 1983") claim alleging that he was demoted in violation of his First Amendment rights. After a complicated and tortuous procedural history,

the district court granted summary judgment against the petitioner. Pet. App. 14a-56a. The court of appeals affirmed. Pet. App. 1a-13a.

1. Petitioner Jeffery Heffernan joined the City of Paterson, New Jersey, Police Department in 1985. He was assigned to work in the office of the Chief of Police James Wittig in 2005 as a detective. In April of 2006, a former Paterson police chief, Lawrence Spagnola, was running for mayor against the incumbent Jose Torres. Thus the election put Chief Wittig in a delicate position, with a former holder of his office challenging his current boss.

Heffernan did not live in Paterson, and therefore could not vote in the mayoral contest. His mother, however, lived in Paterson, supported Spagnola, and asked her son to bring her a Spagnola lawn sign. Heffernan did so merely as a favor to his mother, but not – he has repeatedly and forcefully insisted – as any kind of a political act showing support for Spagnola or affiliation with the Spagnola mayoral campaign. Pet. App. 43a-45a.

Chief Wittig viewed Heffernan's actions as overt involvement with the political campaign, and therefore both a breach of trust and a violation of office policy. Pet. App. 17a. As a result, Heffernan was transferred out of the Chief's office and assigned instead to walking patrol. Pet. App. 17a.

2. Heffernan brought suit against the City of Paterson, Mayor Jose Torres, Police Chief James Wittig, and Police Director Michael Walker. The

complaint can easily be read as alleging a Section 1983 claim for violation of Heffernan's right to freedom of speech. Pet. App. 38a; Complaint ¶¶ 40-41 (referring to "right to freedom of speech" and "right to free speech"); C.A. App. 107a. Understanding the case as a free speech case, the defendants conducted discovery and then moved for summary judgment on the ground that Heffernan had not engaged in any protected speech. Pet. App. 18a. Heffernan voluntarily dismissed the claim against Walker in conjunction with the final pre-trial order, and filed a motion in limine that the court of appeals later determined was more properly viewed a motion for partial summary judgment. Pet. App. 15a, 59a.

The district judge assigned to the case at that time, United States District Judge Peter G. Sheridan, denied the defendants' motion for summary judgment without receiving any brief in opposition from Heffernan. As Judge Sheridan saw it, Heffernan's claim more closely resembled a freedom of association claim. See C.A. App. 113a ("That's more like association rights as opposed to a speech right."). Despite the defendants' objection that they were surprised that a freedom of association claim was in the case, Judge Sheridan conducted a jury trial on the issue of whether Heffernan's right to freedom of association was violated. The jury returned a verdict in favor of the City of Paterson but against Mayor Torres and Chief Wittig, awarding $37,500 in compensatory damages against Torres, $37,000 in compensatory

damages against Wittig, and $15,000 in punitive damages against each. Pet. App. 18a; C.A. App. 125a.

3. After the entry of judgment, Heffernan moved for a new trial, contending that he should have been allowed to pursue his freedom of speech claim. The defendants appealed, contending that Heffernan should not have been allowed to pursue a freedom of association claim.

Judge Sheridan set aside the judgment and ordered a new trial, but not on the grounds argued by the parties. Instead, due to an apparent conflict of interest, he retroactively recused himself and decided that the only recourse was to set aside the verdict and permit a new trial before a different judge. Pet. App. 19a.

4. The case was reassigned to United States District Judge Dennis M. Cavanaugh. At first, Judge Cavanaugh told the parties that he would not consider any dispositive pretrial motions or revisit issues that had already been decided. When the parties objected to this plan, he permitted them to refile their earlier motions for summary judgment, but did not accept briefs in opposition. Pet. App. 19a; 60a.

In contrast to Judge Sheridan, who had denied the defendants' motion for summary judgment without even awaiting briefing by the plaintiff, and construed the plaintiff's claim as a freedom of association claim rather than a free speech claim, Judge Cavanaugh granted the defendants' motion for summary judgment on the grounds raised by that

motion. He ruled that Heffernan had not engaged in any protected speech, and therefore had no viable freedom of speech claim. Judge Cavanaugh said nothing about any freedom of association claim. Pet. App. 66a-71a; 19a; 60a.

In short, the first district judge (who later decided that he should never have heard the case in the first place) treated the case as if it raised only a freedom of association claim (that the defendants contended was never properly in the case) and proceeded to trial, while the second district judge treated the case as if it raised only a freedom of speech claim and granted summary judgment for the defendants.

5. The court of appeals reversed. Pet. App. 57a-65a.

The court of appeals described the procedural history of the case as "complicated and highly unusual." Pet. App. 59a. It concluded that the district court abused its discretion in refusing to allow briefs in opposition, noting that it "is extremely unusual in our experience for a District Court to deny permission to file opposition briefs, particularly on a dispositive motion." Pet. App. 61. It directed the district court to "permit the parties to re-file their summary judgment motions with updated statements of undisputed material fact and to allow full opposition and reply briefing." Pet. App. 63a.

The court of appeals also concluded that it was reversible error for the district court to fail to address Heffernan's freedom of association claim, leaving it to

the district court on remand to consider whether Heffernan adequately pled a freedom of association claim, the extent to which he prosecuted that claim, whether the defendants timely objected to trial of that claim, and the appropriate remedy, including dismissal of that claim, reopening of discovery, or proceeding to trial. Pet. App. 64a.

6. On remand, the case was assigned to a third district judge, United States District Judge Kevin McNulty. After accepting renewed motions for summary judgment, with full briefing, he granted summary judgment for the defendants. Pet. App. 14a-56a.

In a ruling not challenged here, the district court concluded that Heffernan could not prevail on a freedom of speech claim. Relying on Heffernan's own testimony, the court held that there was no genuine factual dispute as to whether Heffernan engaged in protected speech or expressive conduct: the record was clear that Heffernan did not do so. Accordingly, the district court granted summary judgment for the defendants on the freedom of speech claim. Pet. App. 24a-37a.

As for the freedom of association claim, the district court first carefully reviewed the complaint, Heffernan's trial brief, his motion in limine, and the final pretrial order to determine whether it was properly before the court. The district court found one allegation in the complaint that "however indefinitely, at least suggests a freedom-of-association claim," and a passage in Heffernan's trial brief that states that

defendants violated Heffernan's right to freedom of association, "but does not elaborate factually." Pet. App. 38a-39a. The court observed that Heffernan's motion in limine "alludes to a freedom-of-association claim, but in a confusing manner," and that the final pretrial order "invokes the First Amendment generally, but does not invoke freedom of association with specificity." Pet. App. 39a. Finding "some indications" that Heffernan's references to the First Amendment were intended to include both freedom of speech and freedom of association, the district court stated that Heffernan "could and should have been far clearer," and taken advantage of the generous opportunities to amend furnished by Federal Rule of Civil Procedure 15. Pet. App. 40a.

The district court acknowledged that "[i]f the tortuous procedural history of this matter were a film, we could freeze the frame at one point or another and find, from that viewpoint, that Defendants seem to have a valid procedural point." Pet. App. 41a. But the district court nevertheless decided to permit Heffernan to assert a freedom of association claim, invoking the spirit of Rule 1 and Rule 15. Pet. App. 41a.

Turning to the merits of that freedom of association claim, the district court found (in another ruling unchallenged here) that "Heffernan never pled or otherwise asserted that he had any political affiliation with Spagnola *in fact*." Pet. App. 43a (emphasis in original). Similarly, "Heffernan has never testified or otherwise asserted that he actually affiliated

himself with Spagnola's political organization." Pet. App. 44a. "Most importantly, *Heffernan himself* asserted that he had no political connection to Spagnola." Pet. App. 44a (emphasis in original).

As a result, Heffernan's only remaining theory – and the only one pressed in this Court – was that the defendants retaliated against him "because they mistakenly believed" that he was affiliated with the Spagnola campaign. Pet. App. 45a. The district court rejected this theory because "a First Amendment retaliation claim must be premised on an actual exercise of First Amendment rights." Pet. App. 53a.

7. The court of appeals affirmed. Pet. App. 1a-13a.

With regard to the free speech claim, the court of appeals pointed to Heffernan's "unambiguous testimony," testimony that left "no room" for "a jury to find that Heffernan intended to convey a political message when he picked up the sign." Pet. App. 9a-10a.

For the same reason – that is, Heffernan's own confirmation that "he did not have any affiliation with the campaign other than the cursory contact necessary to pick up the sign for his mother" – the court of appeals concluded that "the record is insufficient to allow a jury to return a verdict in Heffernan's favor on his claim of retaliation based on the actual exercise of his right to freedom of association." Pet. App. 10a-11a.

Like the district court, the court of appeals also rejected Heffernan's argument that he could recover based on the theory that the defendants mistakenly believed that he had exercised a First Amendment right. The court of appeals understood that Heffernan was asking it "to eliminate a traditional element of a First Amendment retaliation claim – namely, the requirement that the plaintiff in fact exercised a First Amendment right" – and declined to do so. Pet. App. 11a.

The court of appeals observed that its own binding precedent, as well as precedent from every other circuit to consider the issue, held that "a free-speech retaliation claim is actionable under § 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights." Pet. App. 11a (citing cases from the Fifth, Seventh, and Ninth Circuits as well as the Third). It saw no basis for distinguishing a First Amendment free speech claim from a First Amendment freedom of association claim with regard to this requirement. Pet. App. 13a.

It similarly saw nothing in *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012), to justify a departure from this fundamental principle that a Section 1983 First Amendment claim depends upon the exercise of a First Amendment right. The court of appeals found it particularly significant that *Dye* purported to adopt the reasoning of the First and Tenth Circuits in *Welch v. Ciampa*, 542 F.3d 927 (1st Cir. 2008) and *Gann v. Cline*, 519 F.3d 1090 (10th Cir.

2008). The court of appeals explained that *Welch* and *Gann* are "natural applications" of settled doctrine, recognized by the Third Circuit, see *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265 (3d Cir. 2007), that a public employer "may not discipline an employee based on the decision to remain politically neutral or silent." Thus it held that *Welch*, *Gann*, and *Galli* are fully consistent with the fundamental principle that a Section 1983 First Amendment retaliation claim depends upon the exercise of a First Amendment right, because the First Amendment protects not only the right to speak and to associate, both also the right to *not* speak and to *not* associate. Pet. App. 12a-13a.

The agreement of the court of appeals with *Welch*, *Gann*, and *Galli* did not benefit Heffernan, however, because he presented no evidence that "he was retaliated against for taking a stand of calculated neutrality," but rather contends that he was demoted "on a factually incorrect basis." And that, the court of appeals concluded, is simply not a violation of the Constitution. Pet. App. 13a.

ARGUMENT

I. There is no direct conflict in the courts of appeals.

Certiorari should be denied because there is no direct conflict in the courts of appeals. Petitioner's argument for this Court's intervention is a claimed

three to one split between the decision below by the Court of Appeals for the Third Circuit and decisions by the Courts of Appeals for the First, Sixth, and Tenth Circuits. Pet. 8-14. The decisions asserted to be in conflict with the decision below are *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012); *Welch v. Ciampa*, 542 F.3d 927 (1st Cir. 2008); and *Gann v. Cline*, 519 F.3d 1090 (10th Cir. 2008).

As the Court of Appeals for the Third Circuit recognized, however, its decision in this case, as well as prior Third Circuit precedent, are fully in accord with *Gann* and *Welch*. In both *Gann* and *Welch*, the public employer took retaliatory action against employees who failed to support the employer's preferred candidate or party. Political neutrality was not enough for those employers; they insisted on loyal support. Such employers treated anyone who wasn't a friend as an enemy; in that sense the employers "perceived" an employee who did not affirmatively support their political side as affiliated with the other side – in effect, operating on the principle "if you're not with me, you're against me." As a result, employees who exercised their First Amendment rights to be neutral and to *not* associate with a political candidate or party suffered for their exercise of those rights. The employees in *Gann* and *Welch* would prevail in the Third Circuit, based not only on the decision below, but also based on a Third Circuit decision that predates both *Gann* and *Welch*, *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265 (3d Cir. 2007).

In *Gann*, the plaintiff alleged that the defendant replaced her with another woman because the other woman "demonstrated her political loyalty" by supporting the defendant's campaign while the plaintiff "failed to do so." *Gann v. Cline*, 519 F.3d 1090, 1092 (10th Cir. 2008). The court of appeals rejected the argument that "political non-affiliation is not protected by the First Amendment," concluding instead that "[d]iscrimination based on political non-affiliation is just as actionable as discrimination based on political affiliation." *Id.* at 1093. It noted that "the Third Circuit reached the same conclusion on almost identical facts." *Id.* at 1094 (citing *Galli*).

In *Welch*, the plaintiff "decided not to participate in any campaign activities related to the recall" campaign at issue in that case. *Welch v. Ciampa*, 542 F.3d 927, 934 (1st Cir. 2008). "His decision to remain neutral was regarded as a betrayal by [the defendant], who allegedly perceived those who did not publically support the recall as being against it and, by extension, against him." *Id.* The court rejected the defendants' argument that the plaintiff's "decision to remain neutral during the recall campaign amounts to . . . the lack of any protected political activity," because the "freedom not to support a candidate or cause is integral to the freedom of association and freedom of expression that are protected by the First Amendment." *Id.* at 939.

After concluding that there is "no principled basis for holding that an employee who supports an opposition group is protected by the First Amendment but

one who chooses to remain neutral is vulnerable to retaliation," the court observed that Welch "adduced evidence that officers who did not support the recall election were perceived as opposing it. Whether Welch actually affiliated himself with the anti-recall camp is not dispositive since the pro-recall camp attributed to him that affiliation." In sum, the court "reject[ed] the defendants' argument that Welch's claim fails because he chose to remain neutral in the recall election." *Id.* Taken in context, it is plain that the references to what the employer "perceived" and "attributed" were focused on an employer who perceives neutrals as opponents and attributes to neutrals an affiliation with the enemy. Any doubt on this score is removed by the footnote attached to the passage, which states, "Our conclusion accords with recent decisions of the Third and Tenth Circuits in which those courts determined that political neutrality is protected by the First Amendment." *Id. at* 939 n.3 (citing *Gann* and *Galli*).

The Court of Appeals for the Second Circuit has also recognized the consistency of *Welch*, *Gann*, and *Galli*. In *Wrobel v. County of Erie*, it observed that the First Amendment is violated by "quintessential political patronage," such as firing Republicans, or promoting only Democrats, and then stated:

> The protection of these [patronage] cases has been extended to politically neutral employees who are treated less favorably than employees politically aligned with those in power.

692 F.3d 22, 27-28 (2d Cir. 2012). It cited three cases to support this sentence: *Welch*, *Gann*, and *Galli*.

It is only by wrenching a few words out of context that one can claim any sort of conflict between the Third Circuit and the First and Tenth Circuits. Thus there is scant reason to think that Heffernan would have prevailed in the First or Tenth Circuits, because *Welch* and *Gann* both involved employers who punished employees for exercising their First Amendment right to political neutrality – a far cry from this case in which Heffernan makes no such claim. (Far from punishing political neutrality, Chief Wittig, faced with a campaign between his boss and his predecessor, was trying to promote neutrality in the Chief's office.) This is not the stuff of which direct conflicts are made.

Nor is there a direct conflict between the decision below and *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012). The Court of Appeals for the Sixth Circuit in *Dye* decided to "adopt the reasoning of the First and Tenth Circuits" in *Welch* and *Gann*. *Id.* As we have seen, however, *Welch* and *Gann*, in turn, had noted their agreement with the Third Circuit decision in *Galli*.

And like *Galli*, *Welch*, and *Gann*, *Dye* involved an employer who insisted on political loyalty, thus leaving employees who exercised their First Amendment right to *not* affiliate politically open to adverse treatment. In the words of the *Dye* court, that case involved a Democrat who "retaliates and otherwise

treats poorly those who do not support her or then-Governor Granholm." 702 F.3d at 300. In evaluating the evidence in that case, it pointed to affidavits "detailing the political culture of the agency and [the defendant's] treatment of non-Democrats." 702 F.3d at 301.

Although the Sixth Circuit in *Dye* adopted the reasoning of the First and Tenth Circuit in *Welch* and *Gann*, and the First and Tenth Circuit in *Welch* and *Gann* had agreed the Third Circuit's decision in *Galli*, the Sixth Circuit never mentioned *Galli*. If it had done so, it might have acknowledged that there was no conflict between it and the Third Circuit. (The petitioner, for his part, also fails to mention *Galli*.)

But rather than seeing this agreement among the First, Third, Sixth, and Tenth Circuits, the *Dye* court instead voiced criticism of a different Third Circuit decision, *Ambrose v. Twp. of Robinson*, 303 F.3d 488 (3d Cir. 2002). *Dye*, 702 F.3d at 299. It quoted the requirement in *Ambrose* that plaintiffs "in First Amendment retaliation cases can sustain their burden of proof only if their conduct was constitutionally protected," and characterized *Ambrose* as "reject[ing] a perceived support theory." *Dye*, 702 F.3d at 299 (quoting *Ambrose*, 303 F.3d at 495).

In targeting *Ambrose* for criticism, while ignoring *Galli* (and the agreement with *Galli* noted in *Welch* and *Gann*), the *Dye* court wrote more broadly than

the case required.[1] It did not distinguish between a case that involves a public employer who punishes employees because of their political neutrality (which, unless otherwise justified, undoubtedly penalizes the exercise of the First Amendment right to *not* politically affiliate) and a case like this one that does not. But given the facts of *Dye*, there was no need to consider the distinction drawn by the Court of Appeals for the Third Circuit in this case. Accordingly, as with *Welch* and *Gann*, there is no direct conflict between *Dye* and this case.

II. The conflict in approach is undeveloped, making this Court's intervention premature.

Certiorari should be denied because the courts of appeals have barely begun to address some issues (and have agreed concerning another issue) that the Court will likely need to address if certiorari is granted.

As explained above, the result of the decision below is fully consistent with the results in *Dye*,

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[1] The dissenting opinion in *Dye* states that the plaintiffs did not claim that the defendants were interfering with their right not to affiliate, *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 311 n.2 (6th Cir. 2012) (McKeague, J., dissenting), which may help to explain the overly-broad reasoning of the *Dye* court. See also *id.* at 314 (stating that because of other failures in plaintiffs' case, it was unnecessary to decide the issue regarding perceived affiliation).

Welch, and *Gann*. Some language in *Dye* can be read to sweep more broadly and suggest that an employee should be able to recover under a Section 1983 First Amendment freedom of association claim even where the employee has not exercised that First Amendment right. *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 300 (6th Cir. 2012) (stating that "retaliation based on perceived political affiliation is actionable under the political-affiliation retaliation doctrine").

The Court of Appeals for the Third Circuit, in the decision below, distinguished between cases where a public employer retaliates against an employee because of his exercise of the First Amendment right to *not* associate and cases that do not involve the employee's exercise of the First Amendment right of association at all. But no other court of appeals, including the Court of Appeals for the Sixth Circuit, has considered that distinction. It is premature for this Court to resolve the correctness of that distinction until at least one (and probably more than one) other court of appeals considers and rejects the distinction. Before conclusively resolving that issue, this Court would benefit from the views of multiple courts of appeals.

There is a second, independent, reason why this Court's intervention would be premature. As the court below pointed out, every court of appeals to consider the question has held that "a free-speech retaliation claim is actionable under § 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise

of constitutional rights." Pet. App. 11a (citing cases from the Fifth, Seventh, and Ninth Circuits as well as the Third).

Perhaps because of the unanimity among the courts of appeals, petitioner does not challenge this determination, instead gesturing vaguely in a footnote toward a basis for treating First Amendment freedom of speech claims differently than First Amendment freedom of association claims. Pet. 17-18 n.2. But no court of appeals has found a basis for drawing such a distinction between the two kinds of First Amendment employment retaliation claims. Not the court below, which rejected any such distinction. Pet. App. 13a. Not the Court of Appeals for the Sixth Circuit, which explicitly declined to address the issue in *Dye*. *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 299 n.5 (6th Cir. 2012).

It is conceivable, one may suppose, that this Court could decide the First Amendment freedom of association issue without considering the First Amendment freedom of speech issue. Far more likely, however, is that this Court, before settling the freedom of association question for the nation, would at least want to take into account the closely connected question involving the freedom of speech. See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (describing the "right of free association" as "a right closely allied to freedom of speech").

If so, in order for the petitioner to prevail in this case, the Court would have to decide either (1) that a

public employee may recover in a Section 1983 employment retaliation claim for deprivation of his free speech rights even though he did not exercise the right to freedom of speech or (2) that freedom of speech and freedom of association retaliation cases are properly treated differently with regard to the requirement of an actual exercise of the First Amendment right. The Court would thus be drawn into issues that are not themselves cert-worthy, and on which the petitioner does not seek certiorari, because neither has divided the courts of appeals.

The risk of being drawn into these non-cert-worthy issues is especially high in light of petitioner's basis (proffered in a footnote) for drawing a distinction between the two: that it is usually easier to make correct factual determinations about speech than about association. Pet. 17-18 n.2. Even assuming that this unsupported assertion is true as an empirical matter, it is far from clear which way it cuts. (Should an employer who makes a mistake on an easy question be in a better position than one who makes a mistake on a harder question?). More importantly, there is no reason to believe that this claimed difference in ease of proof should matter at all to the legal point. To the contrary, petitioner's legal theory – provided in the text of the very page containing that footnote – is that because the "First Amendment protects the *freedom* of association, not just the act of associating," he "had a First Amendment right to engage in the very conduct for which his supervisors demoted him, even if he did not engage in it. . . ." Pet.

17 (emphasis in original). That theory is by no means limited to the freedom of association, but applies as well (or as poorly) to the freedom of speech.

It is premature for this Court to decide the question presented in this case until at least one court of appeals creates a conflict by deciding either (1) that a public employee may recover in a Section 1983 employment retaliation claim for deprivation of her free speech rights even though he did not exercise the right to freedom of speech or (2) that freedom of speech and freedom of association retaliation cases are properly treated differently with regard to the requirement of an actual exercise of the First Amendment right. At the very least, this Court should wait until a second court of appeals addresses whether freedom of speech and freedom of association are properly treated differently in employment retaliation cases.

Awaiting further development in the courts of appeals is certainly tolerable. There is no debilitating uncertainty facing multi-state actors regarding their primary conduct, and no risk of forum shopping among circuits, because cases brought by public employees against public employers will be decided in courts located in (or embracing) the state of employment.

Petitioner relies on fanciful fears to support its contention that the issue is important enough to call for this Court's immediate intervention. Petitioner

imagines public employers who are – simultaneously – both fiendishly clever and clumsily foolish.

The public employer of petitioner's imagination is so determined to root out employees with any political difference from himself that he retaliates against employees at the slightest hint of difference, relying on his legal understanding that if he is wrong about the employees' politics and they prove to be completely consistent with his own, he will prevail in a First Amendment freedom of association case.

But this fiendishly clever employer is simultaneously clumsily foolish, because to the extent that he *correctly* targets those with political differences he will *lose* a First Amendment freedom of association case. The result would be a *less* politically congenial workforce, one purged of employees who in fact agree with the employer, but not of those who in fact disagree. Some public employers, no doubt, are fiendishly clever and some, no doubt, are clumsily foolish. But petitioner provides no reason to believe that many are simultaneously both, or (what may be even less likely) that public employees so perceive their bosses.

III. This case is a poor vehicle.

Certiorari should be denied because this particular case is a poor vehicle for considering the question presented. Procedurally, this case has been called "complicated and highly unusual" by the court of appeals and "tortuous" by the third district judge to hear it. Pet. App. 41a, 59a. Most significantly, the

issue presented to this Court was effectively injected into the case by a district judge who later concluded that he should never have been hearing the case in the first place. The issue was kept alive by a third district judge who acknowledged that the defendants "seem to have a valid procedural point" in objecting to its consideration. Pet. App. 41a. That is not the sort of cleanly-presented legal issue appropriate for this Court's consideration.

The respondents have repeatedly argued that the petitioner failed to sufficiently plead and pursue a freedom of association claim. See Pet. C.A. Reply Brief 1 (stating that "Defendants are once again raising the issue of whether a Freedom of Association claim was sufficiently plead by Plaintiff"). If the Court grants certiorari, respondents intend to press this point as an alternative ground for affirmance. See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) (stating that "a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals'") (citing *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n.20 (1979)); *Greenlaw v. United States*, 554 U.S. 237, 250 n.5 (2008). Respondents make this intention clear both as a reason to deny certiorari and to forestall any suggestion of waiver. Cf., e.g., *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010) (deeming waived an alternative

ground for affirmance not raised in the brief in opposition to the petition for writ of certiorari).

Factually, the case is highly unusual. The petitioner seeks this Court's review of a legal issue involving the First Amendment right to freedom of political association. He seeks constitutional protections while emphatically arguing that in picking up a lawn sign for his mother he was engaged in nothing political at all, but merely doing his mother a favor. This was an act with no more First Amendment significance than picking up a quart of milk and loaf of bread for his mother. And he never claims that he was retaliated against because of his political neutrality.

There is no reason to think that this case is remotely typical of a First Amendment freedom of association retaliation case. With one possible exception, none of the cases cited by petitioner (see Pet. 18-19) to illustrate how frequently the issue arises involves a public employee who asserted that he did not exercise the right to political association (including the right to *not* engage in political association) but his employer mistakenly concluded that he had done so. Instead, this case appears to be highly idiosyncratic.

In most of the cited cases, it is clear that the plaintiff claimed an actual exercise of First Amendment rights.[2] In two of the cited cases, although the phrase "perceived political affiliation" appears in the opinion, there is simply nothing to suggest a factual mistake in that regard by the employer.[3]

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[2] See *Holsapple v. Miller*, 2014 WL 525391 at *2 (E.D. Mich. 2014) ("Holsapple testified that he told many of his co-workers that he supported Lee for Bay County Sheriff."); *Hein v. Kimrough*, 942 F. Supp. 2d 1308, 1311 n.1 (2013) (noting that defendants deny that they were aware of plaintiff's support of Hill); *Albino v. Municipality of Guayanilla*, 925 F. Supp. 2d 186 195 (D.P.R. 2013) (holding that "an inference may be drawn that defendant Mayor Arlequin was aware of plaintiff Ruiz's political affiliation because she at times appeared along-side her husband at his political events"); *Silverstein v. Lawrence Union Free School Dist.*, 2011 WL 1261122 at *10 (E.D.N.Y. 2011) ("Silverstein adequately alleges that he was personally active in a group that was opposed to some or all of the defendant Board's decisions."); *Poindexter v. Bd. of Cnty. Comm'rs*, 548 F.3d 916, 918 (10th Cir. 2008) ("Poindexter expressed his full support for the incumbent . . . and refused to campaign or speak out against him," and when the incumbent resigned, "Poindexter ran an advertisement . . . indicating that he intended to run for Commissioner himself."); *Rebrovich v. Cnty. of Erie*, 544 F. Supp. 2d 159, 164-65 (W.D.N.Y. 2008) (indicating that plaintiff told defendant that he "was not politically active" and defendant responded that he was a close friend of the new county executive, that the new administration would eventually get their own people, and that plaintiff would have to "get onboard or pay the consequences"); *Harp v. DeStefano*, 2007 WL 2869831 at *7 (D. Conn. 2007) ("Here, the plaintiffs allege that the Board voted to terminate AECI's contract to retaliate against Harp [the sole owner of AECI] for publicly supporting Killins against DeStefano.").

[3] *Police and Fire Ret. Sys. of Detroit v. Watkins*, 2011 WL 5307594 at *1 (E.D. Mich. 2011) (noting that defendants allege

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The one possible exception is *Good v. Bd. of Cnty. Comm'rs*, 331 F. Supp. 2d 1315, 1325 (D. Kan. 2004), in which the plaintiff "asserted that adverse actions were taken against him because the defendants perceived that he was engaged in protected First Amendment activity," but "made no claim that the defendants discriminated against him on the basis of actual loyalty to a political party, political candidate or advocacy of ideas." Relying on the Third Circuit's decision in *Ambrose* for the proposition that there is no First Amendment retaliation claim where the "employee did not engage in . . . conduct" protected by First Amendment, even if the employer perceived otherwise, the court granted summary judgment for the defendants. *Id.* at 1325-26. It held that "the absence of any allegation that plaintiff was deprived of any association protected by the First Amendment is fatal to his claim." *Id.* at 1325. The Court of Appeals for the Tenth Circuit affirmed "for substantially the same reasons stated by the district court." *Good v. Hamilton*, 141 Fed. Appx. 742, 744 (10th Cir. 2005).

In short, the only case identified by the petitioner that resembles this one reached the same conclusion

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in their counterclaim that plaintiffs declared a default in retaliation for defendant's "'perceived political affiliation with and support of' former Detroit Mayor Kwame Kilpatrick" and turning to the pending motion in limine) (quoting the counterclaim); *Ramirez v. Arlequin*, 357 F. Supp. 2d 416, 424 (D.P.R. 2005) (holding that "Kortnight's professional services contract could legally be terminated due to her perceived political affiliation").

for the same reason – even citing the same Third Circuit opinion – thus further underscoring the absence of any conflict between the Third and Tenth Circuits.

IV. The court of appeals was correct.

Certiorari should be denied because the Court of Appeals for the Third Circuit properly decided this matter. The holding of the court of appeals was straightforward and correct: an employee cannot recover under Section 1983 on the theory that he was retaliated against for exercising a First Amendment right if he did not in fact exercise a First Amendment right.[4] Every court of appeals to consider this question

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[4] Petitioner criticizes the court of appeals for its reliance on the statement in *Waters v. Churchill*, 511 U.S. 661, 679 (1994) ("We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information."), arguing that this statement is only about the Due Process Clause. Pet. 16. But this statement was not some one-off line about due process. It encapsulates the fundamental point that factual mistakes in public employment decisions are properly policed, not by federal judges wielding the Constitution, but by a host of other less lofty, but nevertheless quite important, mechanisms, such as contract, labor law, civil service regulations, and the demands of citizens for efficient government service. In that regard, the *Waters* sentence hardly stands alone. In *Connick*, for example, a free speech case, this Court said:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices,

(Continued on following page)

in the context of the First Amendment right to freedom of speech has reached this same straightforward and correct conclusion. *Ambrose v. Twp. of Robinson*, 303 F.3d 488, 496 (3d Cir. 2002); *Jones v. Collins*, 132 F.3d 1048, 1054 (5th Cir. 1998); *Barkoo v. Melby*, 901 F.2d 613, 619 (7th Cir. 1990); *Wasson v. Sonoma Cnty. Junior Coll.*, 203 F.3d 659, 662 (9th Cir. 2000). And there is no reason to think that a different result should follow in the context of the First Amendment right to freedom of association.

This commonsense result flows naturally from the text of both the Fourteenth Amendment, through which the First Amendment applies to the States, and Section 1983, the statute creating the right of action on which petitioner seeks recovery. The Fourteenth Amendment prohibits the States from "depriv[ing] any person of life, liberty, or property, without due process of law," and Section 1983 creates a right of action against a state actor who "subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

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> without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

Connick v. Myers, 461 U.S. 138, 146-47 (1983).

any rights, privileges, or immunities secured by the Constitution and laws."

The traditional view, reflected in Justice Holmes' famous statement that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892), was rooted in the distinction between a right and a privilege. That traditional view gave way to an understanding that imposing a burden on someone for exercising a right – even by taking away something to which the person had no right, such as a public benefit or public employment – operates as a deprivation of that right equivalent to imposing a penalty for exercising that right. Summarizing the jurisprudential shift, this Court explained in 1972:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . .

> We have applied this general principle to denials of tax exemptions, unemployment benefits, and welfare payments. But, most often, we have applied the principle to denials of public employment.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citations omitted). Thus the theory of First Amendment employment retaliation cases is that an employee has been "deprived" of her First Amendment right if he is penalized (by means of an adverse employment action) because he exercised that First Amendment right. See, e.g., *Wasson v. Sonoma Cnty. Junior Coll.*, 203 F.3d 659, 663 (9th Cir. 2000) ("A First Amendment retaliation claim is not a wrongful termination claim. Rather, a First Amendment retaliation claim seeks to vindicate a public employee's exercise of free speech rights when she has suffered an adverse employment action in response to having spoken out publicly.")[5]

This understanding pervades this Court's First Amendment retaliation cases. For example, this Court has held that the employee must shoulder the burden of showing "that his conduct was constitutionally protected." *Mt. Healthy City Sch. Dist. Bd. of*

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[5] As *Wasson* notes, a litigant who brings a First Amendment retaliation claim without having exercised a First Amendment right appears to be seeking a form of third-party standing (that is, seeking to vindicate, not his own rights, but the rights of others) without meeting the legal requirements for third-party standing. *Wasson v. Sonoma Cnty. Junior Coll.*, 203 F.3d 659, 663 (9th Cir. 2000).

Educ. v. Doyle, 429 U.S. 274, 287 (1977); see also *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (footnote omitted) ("absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment"). Similarly, a probationary employee who "could have been discharged for any reason or for no reason at all," may nonetheless prevail "if she was discharged for exercising her constitutional right to freedom of expression." *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987).

Perry, *Mt. Healthy*, *Pickering*, and *Rankin* are all freedom of speech cases, but the same understanding runs through this Court's freedom of association cases. In the seminal case of *Elrod v. Burns*, the plurality opinion quoted the passage from *Perry*: "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Elrod v. Burns*, 427 U.S. 347, 358-59 (1976) (Brennan, J.) (plurality opinion); see also *id.* at 374-75 (Stewart, J., concurring in the judgment) (citing that section of *Perry* as its only authority). The Court was unable to achieve a majority opinion in *Elrod*, but when it did so in *Branti*, it once again quoted this same passage from *Perry*, again demonstrating that these claims are premised on the employee being penalized because he exercised his First Amendment right to free speech or freedom of association. *Branti v. Finkel*, 445 U.S. 507, 515 (1980). Yet again in *Rutan*, it quoted the same

passage from *Perry*. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72 (1990).

The very language of this oft-repeated passage from *Perry* also illustrates that it applies equally to the First Amendment right to freedom of speech and the First Amendment freedom of association. See also *Branti v. Finkel*, 445 U.S. 507, 515 (1980) ("If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes.").

If an employee has not exercised a First Amendment right to freedom of speech or freedom of association at all, it is impossible to say that he has been penalized because of his exercise of those freedoms. The court of appeals was correct to bar such an employee from prevailing in a Section 1983 First Amendment retaliation case, and its decision leaves the courthouse doors fully open to vindicate the claims of those who do exercise their First Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

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June 2015

No. 14-1280

In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, MAYOR JOSE TORRES, and POLICE CHIEF JAMES WITTIG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents deny the circuit split on the question presented, but the split has been acknowledged by the courts on both sides and by all objective observers. Respondents say it is too soon for this Court to resolve the split, but their only reason for waiting is to allow the circuits to weigh in on issues that are not even present in this case. Respondents conjure various procedural and factual obstacles that ostensibly make this case a poor vehicle, but these supposed obstacles are purely imaginary.

Finally, respondents defend the Third Circuit's decision on the merits. Here respondents are simply mistaken. Under the bizarre rule now in force in the Third Circuit, government employers are free to make baseless accusations of political disloyalty, and they are rewarded for being wrong.

This Court should grant certiorari and reverse.

I. This circuit conflict has been acknowledged by the courts on both sides and by all objective observers.

The split on the Question Presented has been recognized by the most recent courts to weigh in on both sides, the Third and Sixth Circuits. Pet. App. 12a ("we have no reason to believe that the holding of *Dye* can be reconciled with [Third Circuit precedent]—and nor did the Sixth Circuit"); *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 300 (6th Cir. 2012) ("we find the Third Circuit's conclusion unpersuasive"). The split was acknowledged by the District Court below. Pet. App. 47a ("I am bound to fol-

low [Third Circuit precedent]. That said, the United States Court of Appeals for the Sixth Circuit has clearly endorsed a perceived-support theory as a basis for a freedom-of-association retaliation claim.") (citing *Dye*). The split has also been recognized by all courts and commentators to address the issue after *Dye*. *See Lock v. City of West Melbourne*, 2015 WL 1880732, *13 n.13 (M.D. Fla. 2015) ("The Circuit Courts of Appeal [sic] have expressed differing views as to whether a plaintiff may pursue a First Amendment claim based on perceived political affiliation.") (contrasting the Sixth Circuit's decision in *Dye* with the Third Circuit's decision in the instant case); Nicholas A. Caselli, *Bursting the Speech Bubble: Toward a More Fitting Perceived-Affiliation Standard*, 81 U. Chi. L. Rev. 1709, 1710 (2014) ("While the First, Sixth, and Tenth Circuits have permitted perceived-affiliation claims, the Third Circuit has barred such actions."); Kaitlyn Poirier, *Constitutional Law—The First Amendment Retaliation Doctrine—A Public Employee's Rights Regarding Perceived Political Association Retaliation*, 81 Tenn. L. Rev 367, 377 (2014) (referring to the "circuit split on the issue of whether employer retaliation based on political non-association or perceived political association is a recognizable legal claim").

This consensus is correct. The First, Sixth, and Tenth Circuits have all rejected the notion that a public employee may be punished for his perceived political association. *Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008) ("Whether Welch actually affiliated himself with the anti-recall camp is not dispositive since the pro-recall camp attributed to him that

affiliation."); *Dye*, 702 F.3d at 300 ("we adopt the reasoning of the First and Tenth Circuits and hold that retaliation based on perceived political affiliation is actionable under the political-affiliation retaliation doctrine"); *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008) (holding that the employee's actual political affiliations are "irrelevant" because "our only relevant consideration is the impetus for the elected official's employment decision").

In *Welch* and *Gann*, the First and Tenth Circuits also held that neutrality between candidates is a position protected by the First Amendment. *Welch*, 542 F.3d at 939 ("[t]he freedom not to support a candidate or cause is integral to the freedom of association"); *Gann*, 519 F.3d at 1093 ("Discrimination based on political non-affiliation is just as actionable as discrimination based on political affiliation."). Respondents seize on these passages (BIO 13-14) to claim that protection for neutrality is the *only* holding in both cases.

But this view is erroneous. In both cases, the plaintiffs alleged not just that they were neutral but that their employers mistakenly believed that they were political opponents. *Welch*, 542 F.3d at 934 ("His decision to remain neutral was regarded as a betrayal by Cachopa, who allegedly perceived those who did not publicly support the recall as being against it and, by extension, against him."); *Gann*, 519 F.3d at 1092 ("Ms. Gann alleges that Mr. Rinehart replaced her with Ms. Dyer because Ms. Dyer demonstrated her political loyalty to Mr. Rinehart by supporting his campaign while Ms. Gann failed to do so."). The First and Tenth Circuits agreed with the

plaintiffs on both points—that neutrality is a constitutionally protected position, and that the employees did not need to be actual political opponents to be protected by the First Amendment freedom of association. So long as their employers *perceived* them as political opponents and retaliated against them for that reason, the employees stated a First Amendment claim. *Welch*, 542 F.3d at 939; *Gann*, 519 F.3d at 1094.

In an effort to discount the conflict with the Sixth Circuit's decision in *Dye*, respondents fault the Sixth Circuit (BIO 16) for failing to mention a Third Circuit case that also recognizes neutrality as a position protected by the First Amendment. But the Sixth Circuit had no reason to do so, because that question was not at issue in *Dye*. The question presented in *Dye* was—as the court explained in the first paragraph of its opinion—"whether individuals claiming to have been retaliated against because of their political affiliation must show that they were actually affiliated with the political party or candidate at issue." 702 F.3d at 292.

The Sixth Circuit's holding was as clear as it could be: When a government employer mistakenly attributes a political affiliation to an employee, "[a]n employer that acts upon such assumptions regarding the affiliation of her employees should not escape liability because her assumptions happened to be faulty." *Id.* at 302. The Third Circuit reached exactly the opposite conclusion in this case.

II. The conflict should be resolved as soon as possible.

Respondents offer (BIO 18-21) two arguments for delay, but both arguments concern issues that are not even present in this case.

Respondents first urge the Court to wait until more circuits have discussed the distinction "between cases where a public employer retaliates against an employee because of his exercise of the First Amendment right to *not* associate and cases that do not involve the employee's exercise of the First Amendment right of association at all" (BIO 18). But our case involves neither of those questions. The question in our case is whether an employer can retaliate against an employee based on the employer's mistaken belief as to the employee's political affiliation. The Court will not receive any guidance by waiting for more circuits to weigh in on an extraneous issue.

The same is true of respondents' second argument (BIO 18-21), that the Court should wait for more circuits to consider whether retaliation for perceived *speech* is actionable under the First Amendment. This question is not present in our case either, so it is not clear why respondents believe the Court needs further guidance on it. Speech and association are governed by different doctrinal frameworks and different bodies of precedent. *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996). There is nothing to be gained from waiting for additional lower court decisions on speech.

Respondents suggest that no harm could come from delay, because it would be "fanciful" to suppose that a government employer would be so "fiendishly clever and clumsily foolish" as to retaliate against employees based on a mistaken view as to their political affiliations (BIO 21-22). There is considerable irony in this argument. In this very case, a jury found that respondents did precisely that. Pet. App. 4a.

Indeed, the longer the Third Circuit's absurd rule is allowed to fester, the greater its chilling effect will be. Government employees in the Third Circuit are well advised to avoid saying or doing anything that might give the boss the wrong impression, lest what happened to Jeffrey Heffernan happen to them.

III. This case is a perfect vehicle.

Respondents suggest (BIO 22-27) that this case is a poor vehicle because it is procedurally and factually unusual. But this suggestion is mistaken. While this case indeed has a lengthy procedural history, its procedural history has nothing to do with whether it is a good vehicle. And the factual circumstances of this case appear to be quite common.

The lengthy procedural history of this case is due to two facts. The District Judge who first heard the case recused himself retroactively after trial, which required that the verdict in Jeffrey Heffernan's favor be vacated and the case reassigned to a new judge to start all over again. Pet. App. 4a. Then after the second District Judge granted summary judgment for respondents, the Third Circuit reversed and re-

manded, and the case was reassigned yet again. Pet. App. 4a-5a. But that is all water under the bridge. It has no bearing on whether this would be an appropriate case in which to resolve the conflict among the circuits.

Respondents attempt to resuscitate (BIO 23) a nearly frivolous contention they made in the District Court below—that Heffernan's freedom of association claim was not adequately pled. This contention was rightly rejected by the District Court, who pointed out: "This case was, after all, tried and won before Judge Sheridan on a freedom-of-association theory." Pet. App. 42a. At oral argument before the first Third Circuit panel to hear this case, Judge Rakoff (who was sitting by designation) mocked this contention by observing that respondents had "unbelievably clear notice" of the freedom of association claim, in light of the jury's verdict against them on that claim. Pet. App. 42a & n.8. No doubt for this reason, respondents did not even raise this contention as an argument in Third Circuit briefing below, but referred to it only tangentially as part of their Statement of the Case. Resp. C.A. Br. 2, 4.

The procedural issues respondents pose as obstacles had thus been fully and completely resolved by the time the case reached the Third Circuit in 2014. The only issue before the Third Circuit was whether Heffernan's First Amendment claims are cognizable, and that remains the only issue here.

Respondents are simply incorrect in claiming (BIO 24-27) that the Question Presented rarely arises. *See* Pet. 18-19 (citing many recent cases in which

government employees have brought First Amendment claims based on perceived political association). Respondents' quotations from these cases (BIO 25-26 nn.2-3) show only that plaintiffs often raise actual-association and perceived-association claims in the same lawsuit.

IV. The Third Circuit's bizarre rule rewards the worst supervisors and chills an enormous amount of political association.

Finally, respondents' review of some of this Court's First Amendment retaliation cases (BIO 29-32) is beside the point, because the passages respondents cite merely show that the First Amendment bars retaliation for *actual* association. No one doubts that. The question that has divided the circuits is whether the same is true for *perceived* association, and that is a question this Court has never addressed.

The closest the Court has come to addressing the question was in *Waters v. Churchill*, 511 U.S. 661, 679-80 (1994), which held that where a public employee is fired due to a supervisor's misperception of what the employee said, it is the supervisor's perception that counts, not what a trier of fact ultimately determines to have taken place. The First Amendment inquiry thus focuses on the employer's *reason* for retaliating against the employee, not on whether the employer happened to be correct. *Cf. Branti v. Finkel*, 445 U.S. 507, 517 (1980) ("To prevail in this type of an action, it was sufficient ... for respondents to prove that they were discharged solely for the rea-

son that they were not affiliated with or sponsored by the Democratic Party.") (citation and internal quotation marks omitted).

Any other conclusion would yield the strange and frightening rule adopted by the Third Circuit, which rewards the worst-behaving government supervisors with immunity from constitutional challenge, and which chills an enormous amount of political association. As the District Court wondered, if a state employer has an "unconstitutional retaliatory motive, *and is wrong to boot*, should it really be placed in a more favorable position? Might the Third Circuit approach permit employers to intimidate employees into avoiding anything that might even be *mis* construed as political speech or affiliation? The *Dye* approach seems designed to afford the First Amendment some breathing room." Pet. App. 52a (footnote omitted).[1]

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[1] Our certiorari petition erroneously named Michael Walker as a respondent. We have removed his name from the case caption.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 14-1280

In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, MAYOR JOSE TORRES, and POLICE CHIEF JAMES WITTIG,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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2:06cv3882

Heffernan v. City of Paterson et al

Date	#	Proceeding Text
8/17/2006	1	COMPLAINT against CITY OF PATERSON, Jose Torres, JAMES WITTIG, MICHAEL WALKER (Filing fee $ 350 receipt number 1106275.) JURY DEMAND, filed by JEFFREY J. HEFFERNAN. (lm2,) (Entered: 08/18/2006)
11/28/2006	3	ANSWER to Complaint with Jury Demand by CITY OF PATERSON.(RIVAS, ALBERTO) (Entered: 11/28/2006)
1/26/2009	39	MOTION in Limine by JEFFREY J. HEFFERNAN. (ZEFF, GREGG) (Entered: 01/26/2009)
01/26/2009	40	MOTION for Summary Judgment Notice of Defendants' Motion for Summary Judgment by CITY OF PATERSON, Jose Torres, JAMES WITTIG, MICHAEL WALKER. Responses due by 2/17/2009 (Attachments: # 1 Brief Memorandum of Law in Support of Defendants Motion for Summary Judgment, # 2 Certification of Victor A. Afanador, # 3 Defendants' Local Civil Rule 56.1 Statement of Undisputed Facts in Support of Motion for Summary

		Judgment, # 4 Text of Proposed Order, # 5 Certificate of Service) (AFANADOR, VICTOR) (Entered: 01/26/2009
02/09/2009	41	TRIAL BRIEF by JEFFREY J. HEFFERNAN. (ZEFF, GREGG) (Entered: 02/09/2009)
02/09/2009	46	TRIAL BRIEF of Defendants by CITY OF PATERSON, Jose Torres, JAMES WITTIG. (Attachments: # 1 Appendix to trial brief) (AFANADOR, VICTOR) (Entered: 02/09/2009)
02/24/2009	53	FINAL PRETRIAL ORDER. Signed by Magistrate Judge Esther Salas on 2/24/09. (Attachments: # 1 Part 2, Final Pretrial Order) (dc,) (Entered: 02/24/2009)
04/17/2009	76	JURY VERDICT filed 4/17/09. (dh,) (Entered: 04/23/2009)
04/17/2009	77	JURY VERDICT on Punitive damages filed on 4/17/09. (dh,) (Entered: 04/23/2009)
04/27/2009	78	JUDGMENT in favor of JEFFREY J. HEFFERNAN against JAMES WITTIG, JOSE TORRES in the amount of $37,500.00 each; on Punitive damages in favor of JEFFREY J. HEFFERNAN against JAMES WITTIG, JOSE TORRES in the amount of $15,000.00 each. Signed by Judge Peter G. Sheridan on 4/24/09. (dc,) (Entered: 04/27/2009)

3/8/2013	185	Cross MOTION for Summary Judgment *returnable April 1, 2013* by Jose Torres. Responses due by 3/18/2013 (Attachments: # 1 Certification of filing and service, # 2 Certification of Albert C. Lisbona, # 3 Statement of Non-Necessity of Brief, # 4 Text of Proposed Order, # 5 Cover letter of enclosure) (LISBONA, ALBERT) (Entered: 03/08/2013)
3/8/2013	186	MOTION for Summary Judgment by JAMES WITTIG. Responses due by 3/22/2013 (Attachments: # 1 Cover Letter, # 2 Text of Proposed Order, # 3 Certificate of Service) (JEAN, ROOSEVELT) (Entered: 03/08/2013)
3/8/2013	187	MOTION for Summary Judgment by Jose Torres. Responses due by 3/22/2013 (Attachments: #1 Text of Proposed Order, # 2 Certificate of Service) (POTTERS, GARY) (Entered: 03/08/2013)
3/8/2013	188	MOTION for Summary Judgment by JAMES WITTIG. Responses due by 3/22/2013 (Attachments: # 1 Text of Proposed Order) (SCRIVO, THOMAS) (Entered: 03/08/2013)
3/8/2013	189	Joint MOTION for Summary Judgment by CITY OF PATERSON. (Attachments: # 1 Brief In Support of Defendants' Joint Motion for Summary Judgment, # 2 Statement of Undisputed Material Facts pursuant to Rule 56.1(a), # 3 Certification

of Victor A. Afanandor, # 4 Exhibit A of Victor A. Afanandor, # 5 Exhibit B (part 1 of 2) of Victor A. Afanandor, # 6 Exhibit B (part 2 of 2) of Victor A. Afanandor, # 7 Exhibit C of Victor A. Afanandor, 8 Exhibit D of Victor A. Afanandor, # 9 Exhibit E of Victor A. Afanandor, # 10 Exhibit F of Victor A. Afanandor, # 11 Exhibit G of Victor A. Afanandor, # 12 Exhibit H of Victor A. Afanandor, # 13 Exhibit I of Victor A. Afanandor, # 14 Exhibit J of Victor A. Afanandor, # 15 Exhibit K of Victor A. Afanandor, # 16 Exhibit L of Victor A. Afanandor, # 17 Exhibit M of Victor A. Afanandor, # 18 Exhibit N of Victor A. Afanandor, # 19 Exhibit O of Victor A. Afanandor, # 20 Exhibit P of Victor A. Afanandor, # 21 Exhibit Q. of Victor A. Afanandor, # 22 Exhibit R of Victor A. Afanandor, 23 Certification of Gary Potters, Esq. with Exhibits, # 24 Certification of Victor A. Afanador, Esq., Regarding Trial Transcript, # 25 Text of Proposed Order) (AFANADOR, VICTOR) (Entered: 03/08/3013)

3/8/2013 190 MOTION for Summary Judgment *as to the limited issue of whether Plaintiff engaged in protected speech pursuant to the First Amendment* by JEFFREY J. HEFFERNAN. Responses due by 3/22/2013 (Attachments: # 1 Text of Proposed Order,

		# 2 Statement of Facts Pursuant to Local Rules 56.1, #3 Certification of Plaintiffs Counsel Ryan Lockman, # 4 Brief, # 5 Exhibit A-JJ) (LOCKMAN, RYAN) (Entered: 03/08/2013)
4/5/2013	196	BRIEF in Opposition filed by CITY OF PATERSON re 190 MOTION for Summary Judgment *as to the limited issue of whether Plaintiff engaged in protected speech pursuant to the First Amendment* (Attachments: # 1 Certification of Victor A. Afanador) (AFANADOR, VICTOR) (Entered: 04/05/2013)
4/5/2013	197	RESPONSE in Opposition filed by JEFFREY J. HEFFERNAN re 187 MOTION for Summary Judgment, 186 MOTION for Summary Judgment, 189 Joint MOTION for Summary Judgment, 188 MOTION for Summary Judgment, 185 Cross MOTION for Summary Judgment *returnable April 1, 2013* (Attachments: # 1 Statement Plaintiff's Response to Defendants' Statement of Facts Pursuant to Local Rule 56.1, # 2 Statement Plaintiff's Counter-Statement of Facts Pursuant to Local Rule 56.1, # 3 Brief, # 4 Exhibit A-QQ) (LOCKMAN, RYAN) (Entered: 04/05/2013)
4/19/2013	200	BRIEF in Support filed by JEFFREY J. HEFFERNAN re 190 MOTION for

		Summary Judgment as to the limited issue of whether Plaintiff engaged in protected speech pursuant to the First Amendment – Plaintiff's Reply Brief In Support of the Motion, (LOCKMAN, RYAN) (Entered: 04/19/2013)
4/19/2013	201	BRIEF in Support filed by CITY OF PATERSON re 189 Joint MOTION for Summary Judgment (Attachments: # 1 Statement) (AFANADOR, VICTOR) (Entered: 04/19/2013)
3/5/2014	205	OPINION. Signed by Judge Kevin McNulty on 3/5/14. (gmd,) (Entered: 03/05/2014)
3/5/2014	206	ORDER that the motion for summary judgment of Defendant Police Chief James Wittig is GRANTED; that the motions for summary judgment of Defendants Mayor Jose Torres and City of Paterson are GRANTED IN PART, but are DENIED IN PART to the extent they seek summary judgment on grounds pertaining to them individually which have been rendered MOOT; that Plaintiff's Motion for partial summary judgment is DENIED; and that the Complaint is DISMISSED WITH PREJUDICE. * * * CIVIL CASE TERMINATED * * * Signed by Judge Kevin McNulty on 3/5/14. (gmd,) (Entered: 03/05/2014)

3/12/2014	207	NOTICE OF APPEAL as to 205 Opinion, 206 Order on Motion for Summary Judgment,,,,,,,,,,,, by JEFFREY J. HEFFERNAN. Filing fee $ 505, receipt number 0312-5557569. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. Appeal Record due by 4/4/2014. (LOCKMAN, RYAN) (Entered: 03/12/2014)
1/22/2015	209	USCA JUDGMENT Affirming Order/ Judgment of the District Court as to 207 Notice of Appeal (USCA), filed by JEFFREY J. HEFFERNAN (ca3cjg) (Entered: 01/22/2015)
2/23/2015	210	MANDATE of USCA issued. (Attachments: # 1 mandate letter, # 2 opinion) (Entered: 02/23/2015)

Relevant Docket Entries for the United States District Court For the Third Circuit Court of Appeals

14-1610

03/13/2014	CIVIL CASE DOCKETED. Notice filed by Appellant Jeffrey J. Heffernan in District Court No. 2-06-cv-03882. (PDB)
03/13/2014	RECORD available on District Court CM/ECF. (PDB)
08/11/2014	ECF FILER: ELECTRONIC BRIEF with Volume I of Appendix attached on behalf of Appellant Jeffrey J. Heffernan, filed. Certificate of Service dated 08/11/2014 by ECF. (RML)
08/11/2014	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellant Jeffrey J. Heffernan, filed. Certificate of service dated 08/11/2014 by ECF. (RML)
08/11/2014	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellant Jeffrey J. Heffernan, filed. Certificate of service dated 08/11/2014 by ECF. (RML)
08/11/2014	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellant Jeffrey J. Heffernan, filed. Certificate of service dated 08/11/2014 by ECF. (RML)
09/15/2014	ECF FILER: JOINT ELECTRONIC BRIEF on behalf of Appellees City of Paterson, Jose Torres and James Wittig, filed. Certificate of Service dated 09/15/2014 by ECF. [Modifier added] – [Edited 09/16/2014 by EMA] (ACL)

09/29/2014	ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellant Jeffrey J. Heffernan, filed. Certificate of Service dated 09/29/2014 by ECF. (RML)
09/30/2014	Calendared for Thursday, 12/11/2014. (PM)
11/25/2014	Submit Notification for Thursday, 12/11/2014. (PM)
12/11/2014	SUBMITTED on Thursday, December 11, 2014. Panel: VANASKIE, GREENBERG, COWEN, Circuit Judges. (PM)
12/11/2014	COURT MINUTES OF ARGUED/ SUBMITTED CASES. [13-3498, 14-1287, 14-1610, 14-1623, 14-2729] (PM)
01/22/2015	PRECEDENTIAL OPINION Coram: VANASKIE, GREENBERG and COWEN, Circuit Judges. Total Pages: 14. Judge: VANASKIE Authoring. [Opinion was docketed as a Not Precedential. The Opinion is a Precedential Opinion and has been corrected. Notice is being resent.]-[Edited 01/22/2015 by CJG] (CJG)
01/22/2015	JUDGMENT, Affirmed. Costs taxed against Appellant. (CJG)
02/02/2015	ECF FILER: Petition filed by Appellant Jeffrey J. Heffernan for Rehearing before original panel and the court en banc. Certificate of Service dated 02/02/2015. (RML)

02/13/2015	ORDER (MCKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, SHWARTZ, KRAUSE, GREENBERG and COWEN, Circuit Judges) denying Petition for Panel and En Banc Rehearing filed by Appellant Jeffrey J. Heffernan, filed. Vanaskie, Authoring Judge. *The votes of the Honorable Robert E. Cowen and the Honorable Morton I. Greenberg are limited to panel rehearing only. (TMM)
02/23/2015	MANDATE ISSUED, filed. (TMM)
04/27/2015	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Jeffrey J. Heffernan on 04/22/2015 and placed on the docket 04/24/2015 as Supreme Court Case No. 14-1280. (CND)
10/01/2015	NOTICE of U.S. Supreme Court disposition at No. 14-1280. Petition for Writ of Ceriorari filed by Jeffrey J. Heffernan granted on 10/01/2015. (LML)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY J. HEFFERNAN, 1 Emmanuel Avenue Wayne, NJ 07470, Plaintiff, v. CITY OF PATERSON, 155 Market Street Paterson, NJ 07505, and MAYOR JOSE TORRES, Individually and as Mayor of the City of Paterson, 155 Market Street Paterson, NJ 07505, and POLICE CHIEF JAMES WITTIG, Individually and as Chief of the City of Paterson Police Department, 111 W Broadway Paterson, NJ 07522, and POLICE DIRECTOR MICHAEL WALKER, Individually and as Director of the City of Paterson	CIVIL ACTION NO. JURY TRIAL DEMANDED,

Police Department :
111 W Broadway :
Paterson, NJ 07522, :
:
Defendants. :

CIVIL ACTION – COMPLAINT

(Filed Aug. 17, 2006)

Plaintiff Jeffrey J. Heffernan, by and through his attorneys, Frost & Zeff, hereby brings this Complaint against Defendants City of Paterson, Mayor Jose Torres, Police Chief James Wittig and Police Director Michael Walker, and in support thereof avers as follows:

I. INTRODUCTION

1. This action for declaratory, injunctive, monetary and other appropriate relief is brought by Plaintiff Jeffrey J. Heffernan to redress the intentional violations by Defendants City of Paterson, Mayor Jose Torres, Police Chief James Wittig and Police Director Michael Walker, of the rights secured to him by the laws of the United States of America and the State of New Jersey.

II. JURISDICTION

2. This action is brought pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments of the United States Constitution. Jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343(3) and the aforementioned statutory and constitutional provisions.

3. Jurisdiction lies over state law claims based on the principles of supplemental jurisdiction, as codified at 28 U.S.C. § 1367

4. The amount in controversy exclusive of interest and costs exceeds the sum of One Hundred Thousand ($100,000.00) Dollars.

III. VENUE

5. All the claims herein arose within the jurisdiction of the United States District Court for the District of New Jersey and involve Defendants who reside within the jurisdictional limits. Venue is accordingly invoked pursuant to the dictates of 28 U.S.C. § 1391(b) and (c).

IV. PARTIES

6. Plaintiff Jeffrey J. Heffernan (hereinafter "Plaintiff") is an adult individual citizen of the State of New Jersey, residing therein at 1 Emmanuel Avenue, Wayne, New Jersey 07470.

7. Defendant City of Paterson is a municipal corporation within the State of New Jersey located at 155 Market Street, Paterson, New Jersey 07505.

8. Defendant Mayor Jose Torres is, and was at all times material hereto, the Mayor of the City of Paterson, a municipal corporation within the State of New Jersey located at 155 Market Street, Paterson, New Jersey 07505. Mayor Torres is sued individually and in his official capacity.

9. Defendant Police Chief James Wittig is, and was at all times material hereto, the Chief of the City of Paterson Police Department, located at 111 W. Broadway, Paterson, New Jersey 07522. Chief Wittig is sued individually and in his official capacity.

10. Defendant Police Director Michael Walker is, and was at all times material hereto the Director of the City of Paterson Police Department, located at 111 W. Broadway, Paterson, New Jersey 07522. Director Walker is sued individually and in his official capacity.

V. FACTS

11. Plaintiff was hired as a police officer with the City of Paterson Police Department on or about November 11, 1985.

12. In or about 1996, Plaintiff was assigned to the Communications Division.

13. On or about December 18, 2005, Plaintiff was promoted to Detective. He was thereafter assigned to the Chief's Office.

14. In 2006, Lawrence Spagnola was running for Mayor of the City of Paterson against incumbent Defendant Mayor Jose Torres.

15. Plaintiff and his family had a close personal relationship with Spagnola.

16. Plaintiff is not, and was not at any time material hereto, a resident of the City of Paterson. As

such, Plaintiff was not eligible to vote in the 2006 Paterson mayoral election.

17 On April 13, 2006, Plaintiff, while off-duty, went to visit his mother, a resident of Paterson.

18. Plaintiff's mother supported Spagnola for mayor and had a sign in her front lawn which supported Spagnola's candidacy.

19. On April 13, 2006, Plaintiff's mother stated to Plaintiff that she wished to have a larger sign supporting Spagnola for her lawn and asked Plaintiff to assist her in obtaining one.

20. In response, Plaintiff went to obtain such a sign from Paterson City Councilman Alson [sic] Goew [sic].

21. At approximately 2:00 p.m. on April 13, 2006, Plaintiff, along with his son, were parked in Plaintiff's vehicle at the corner of Union and Berkshire Avenues in Paterson, waiting for City Councilman Alson [sic] Goew [sic] to arrive to deliver Plaintiff a sign supporting Spagnola's candidacy.

22. At that time, Paterson Police Officer Arsinio [sic] Sanchez, then on-duty, arrived on scene.

23. Sanchez spoke briefly with Councilman Goew [sic], who had also arrived.

24. Councilman Goew [sic] then approached Plaintiff's vehicle and advised Plaintiff that Officer Sanchez had contacted Defendant Chief Wittig and advised same that Plaintiff was with Councilman Goew [sic].

25. On April 13, 2006, Paterson Police Officer John Maes advised Plaintiff during a telephone conversation that Maes had been informed that Plaintiff was putting up signs supporting Spagnola and that "they are all pissed off" and "hell is going to break loose over this."

26. On April 14, 2006, Plaintiff was demoted to the Traffic Division Walking Squad, effective April 17, 2006.

27 In the Paterson Police Department, a transfer to the Traffic Division Walking Squad is used as punishment.

28. That day, April 14, 2006, Plaintiff went to the Chief's Office to collect his personal belongings. While there, Lieutenant Patrick Papagni and Deputy Chief William Fraher advised Plaintiff that he was not being transferred because of his job performance, rather, he was being transferred because of his political affiliation to Spagnola.

29. At this time, Plaintiff was further advised by Lieutenant Papagni and Deputy Chief Fraher that Defendant Mayor Torres had instructed Defendant Chief Wittig to transfer Plaintiff.

30. It was subsequently confirmed to Plaintiff by City of Paterson Business Administrator Eli Burgos that Plaintiff's demotion was indeed political and it was ordered by Defendant Mayor Torres.

31. Plaintiff was demoted in direct retaliation for his exercise of protected activities.

32. On or about May 26, 2006, City of Paterson Police Officer Wayne Smith instituted a civil action

against Defendants City of Paterson and Paterson Police Chief James Wittig, in the United States District Court for the District of New Jersey, *Wayne Smith v. City of Paterson, et al.*, Civil Action No. 06-2409. This suit alleged violations of 42 U.S.C. § 1983 in connection with Defendants' flawed 911 operating system and untrained 911 dispatchers, Smith alleged, caused the death of Smith's son.

33. Plaintiff was assigned to the Communications Division, which includes the 911 system, at all times material to the aforementioned lawsuit.

34. In connection with same, Plaintiff was questioned by attorneys for Defendants on or about July 20, 2006.

35. In response to questioning, Plaintiff stated, among other things, that Defendants' 911 system was seriously flawed, that many 911 dispatchers were not adequately trained, that despite the efforts of Plaintiff and others, the City failed to adequately train the 911 dispatchers and that, despite numerous complaints by Plaintiff and others, the City failed to take any steps to fix the flawed 911 system. Plaintiff further stated at this time that he believed Wayne Smith had legitimate claims.

36. In direct retaliation therefore, on or about August 3, 2006, Police Sergeants John Russo and Kelly Hemming, and Lieutenant Dave Rivello, came to Plaintiff's home and confiscated Plaintiff's department-issued firearm and his personal firearms.

37 There was no legitimate basis whatsoever for Defendants to take this action.

38. Plaintiff had not been declared unfit for duty and/or a danger to himself or others by any physician, Plaintiff had not been the subject of any department internal affairs investigation or report, and no written directive had been issued by the Chief or any other Defendant personnel calling for Plaintiff's weapons to be seized.

COUNT I
42 U.S.C. § 1983
FIRST AMENDMENT VIOLATIONS

39. Plaintiff incorporates by this reference herein as though recited verbatim at length the allegations contained in paragraphs 1 through 38 above.

40. Defendants violated the provisions of 42 U.S.C. § 1983, in that Defendants, acting under color of State law, deprived Plaintiff of the privileges and immunities secured to him by the First and Fourteenth Amendments of the United States Constitution and, in particular, his right to hold employment without infringement of his First Amendment right to freedom of speech.

41. Defendants intentionally, wilfully, and recklessly transferred Plaintiff in order to deny Plaintiff his First Amendment right to free speech.

42. Defendants' actions were to penalize and retaliate against Plaintiff for his exercise of fundamental First Amendment rights.

WHEREFORE, Plaintiff, Jeffrey J. Heffernan, respectfully requests this Honorable Court:

1. Enter a declaratory judgment that Defendants' retaliatory acts complained of herein have violated and continue to violate the rights of Plaintiff as secured by the United States Constitution;

2. Enjoin Defendants from continuing its retaliatory practices;

3. Award Plaintiff compensatory damages including but not limited to: pain, suffering, past economic loss, future economic loss, back pay, front pay, wage increases, loss of life's pleasures, loss of reputation, benefits, emotional distress and other damages;

4. Award reasonable costs and attorney's fees;

5. Aware [sic] punitive damages; and

6. Grant any other relief this Court deems just and proper under the circumstances.

COUNT II
VIOLATION OF THE CONSCIENTIOUS EMPLOYEE PROTECTION ACT
N.J.S.A. 34:19-1 *et. seq.*

43. Plaintiff incorporates by this reference herein as though recited verbatim at length the allegations contained in paragraphs 1 through 42 above.

44. Plaintiff spoke out against and reported the poor state of Defendants' 911 operating system and

the fact that Defendant 911 dispatchers were not adequately trained.

45. Defendants retaliated against Plaintiff directly therefore.

46. Defendants' actions violate the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et. seq.*

47 As a direct and proximate result of Defendants' actions, Plaintiff has, and will in the future, suffer pain, emotional distress, humiliation, embarrassment, inconvenience, loss of pleasure and enjoyment of life, loss of reputation, lost wages, lost wage earning capacity, loss of benefits, and past and future medical expenses.

WHEREFORE, Plaintiff, Jeffrey J. Heffernan, respectfully requests this Honorable Court:

1. Enter a declaratory judgment that Defendants' retaliatory acts complained of herein have violated and continue to violate the rights of Plaintiff as secured by the United States Constitution;

2. Enjoin Defendants from continuing its retaliatory practices;

3. Award Plaintiff compensatory damages including but not limited to: pain, suffering, past economic loss, future economic loss, back pay, front pay, wage increases, loss of life's pleasures, loss of reputation, benefits, emotional distress and other damages;

4. Award reasonable costs and attorney's fees;

5. Aware [sic] punitive damages; and

6. Grant any other relief this Court deems just and proper under the circumstances.

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted,

FROST & ZEFF

BY: *s/ Gregg. L. Zeff*
GREGG L. ZEFF, ESQUIRE
MICHAEL C. KSIAZEK, ESQUIRE
Attorneys for Plaintiffs

DATED: August 17, 2006

LITE DEPALMA GREENBERG & RIVAS, LLC
Alberto Rivas, Esq.
Victor A. Afanador
Two Gateway Center, 12th Floor
Newark, New Jersey 07102-5003
(973) 623-3000
Attorneys for Defendants,
the City of Paterson, Mayor Jose Torres,
Police Chief James Wittig, and
Police Director Michael Walker.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JEFFREY HEFFERNAN Plaintiff, v. CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTING [sic], and POLICE DIRECTOR MICHAEL WALKER, Defendants.	Docket No.: 06-CV-03882 Civil Action **ANSWER WITH AFFIRMATIVE DEFENSES, DEMAND FOR JURY TRIAL, DESIGNATION OF TRIAL COUNSEL, AND CERTIFICATION** (Filed Nov. 28, 2006)

Defendants, the City of Paterson, Mayor Jose Torres, Police Chief James Wittig, and Police Director Michael Walker, answer the Complaint of Plaintiff, insofar as it relates to such defendants as follows:

I. INTRODUCTION

1. Defendants deny the allegations in paragraph 1 of the Complaint.

II. JURISDICTION

2. Defendants deny the allegations in paragraph 2 of the Complaint.

3. Defendants deny the allegations in paragraph 3 of the Complaint.

4. Defendants deny the allegations in paragraph 4 of the Complaint.

III. VENUE

5. Defendants lack sufficient knowledge to form a belief as to the allegation set forth in Paragraph 5. Therefore, Defendants deny these allegations and demand proof thereof.

IV. PARTIES

6. Defendants do not admit or deny the statements in paragraph 6 of the Complaint because they make no allegations against these defendants.

7 Defendants admit the allegations in paragraph 7 of the Complaint.

8. Defendants admit the allegations in paragraph 8 of the Complaint.

9. Defendants admit the allegations in paragraph 9 of the Complaint.

10. Defendants admit the allegations in paragraph 10 of the Complaint.

V. FACTS

11. Defendants admit the allegations in paragraph 11 of the Complaint.

12. Defendants admit the allegations in paragraph 12 of the Complaint.

13. Defendants admit the allegations in paragraph 13 of the Complaint.

14. Defendants admit the allegations in paragraph 14 of the Complaint.

15. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 15 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

16. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 16 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

17 Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 18 of the Complaint. Therefore,

Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

18. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 18 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

19. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 19 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

20. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 20 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

21. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 21 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

22. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 22 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

23. Defendants lack sufficient knowledge or information to form a belief as to the truth of the

allegations of paragraph 23 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

24. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 24 of the Complaint. Therefore, Defendants deny these allegations and, as such Plaintiff is left to his proofs.

25. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 25 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

26. Defendants deny the allegations in paragraph 26 of the Complaint.

27 Defendants deny the allegations in paragraph 27 of the Complaint.

28. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 28 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

29. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 29 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

30. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 30 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

31. Defendants deny the allegations in paragraph 31 of the Complaint.

32. The complaint filed in *Wayne Smith v. City of Paterson et al.*, Civil Action No. 06-2409 is a legal document and thus, speaks for itself.

33. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 33 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

34. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 34 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

35. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 35 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

36. Defendants deny the allegations in paragraph 36 of the Complaint.

37 Defendants deny the allegations in paragraph 37 of the Complaint.

38. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 38 of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

COUNT I
42 U.S.C. § 1983
FIRST AMENDMENT VIOLATIONS

39. Defendants repeat and re-allege their answers to each and every allegation contained in paragraphs 1 through 38 as if set forth at length herein.

40. Defendants deny the allegations of paragraph 40 of Count I of the Complaint.

41. Defendants deny the allegations of paragraph 41 of Count I of the Complaint.

42. Defendants deny the allegations of paragraph 42 of Count I of the Complaint.

WHEREFORE, Defendants, the City of Paterson, Mayor Jose Torres, Police Chief James Wittig, and Police Director Michael Walker, demand judgment dismissing plaintiff's Complaint, with prejudice, together with costs of suit and such other relief as the Court deems equitable and just.

COUNT II
VIOLATION OF THE CONSCIENTIOUS EMPLOYEE PROTECTION ACT
N.J.S.A. 34:19-1, *et seq.*

43. Defendants repeat and re-allege their answers to each and every allegation contained in paragraphs 1 through 42 as if set forth at length herein.

44. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 44 of Count II of the Complaint. Therefore, Defendants deny these allegations and, as such, Plaintiff is left to his proofs.

45. Defendants deny the allegations of paragraph 45 of Count II of the Complaint.

46. Defendants deny the allegations of paragraph 46 of Count II of the Complaint.

47. Defendants deny the allegations of paragraph 47 of Count II of the Complaint.

WHEREFORE, Defendants, the City of Paterson, Mayor Jose Torres, Police Chief James Wittig, and Police Director Michael Walker, demand judgment dismissing plaintiff's Complaint, with prejudice, together with costs of suit and such other relief as the Court deems equitable and just.

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

The Plaintiff has failed to join all necessary parties for a proper adjudication of the within matter.

THIRD SEPARATE DEFENSE

Defendants have not deprived the Plaintiff of any constitutionally protected property or liberty interest or any other rights or privileges, guaranteed to Plaintiff.

FOURTH SEPARATE DEFENSE

In the event any action of Defendants deprived or caused a deprivation of Plaintiff's federally protected rights (which defendants deny), then, and in any event, all such actions of the Defendants were taken in good faith and without any fraud or malice and with a reasonable belief that such actions were lawful.

FIFTH SEPARATE DEFENSE

Defendants did not, and were not reasonably expected to know that any actions taken with respect to the Plaintiff were in violation of plaintiff's rights.

SIXTH SEPARATE DEFENSE

If Plaintiff sustained any damages, which Defendants deny, the damages were caused by Plaintiff's sole negligence or by persons over whom defendants had no control.

SEVENTH SEPARATE DEFENSE

Plaintiff fails to allege any claims against Mayor Jose Torres, Chief James Wittig, or Director Michael Walker.

EIGHTH SEPARATE DEFENSE

Any alleged actors that are agents of a municipality, an instrumentality of the State of New Jersey and, at all times relevant hereto, their actions were taken pursuant to lawful authority vested unto them, and all such acts so performed were a reasonable and appropriate exercise of discretion based upon the information available to them.

NINTH SEPARATE DEFENSE

The Complaint is frivolous and without merit as to the answering Defendants and should be stricken on this basis.

TENTH SEPARATE DEFENSE

Plaintiff is not entitled to punitive damages against these Defendants and as such, these claims are barred by state and federal law.

ELEVENTH SEPARATE DEFENSE

Defendants deny any breach of duty to Plaintiff.

TWELFTH SEPARATE DEFENSE

The intentional conduct of Plaintiff is the direct and proximate cause of his damages, if any.

THIRTEENTH SEPARATE DEFENSE

This claim is barred by the doctrine of unclean hands.

FOURTEENTH SEPARATE DEFENSE

All of the acts of these Defendants were performed in good faith and, therefore, these Defendants are entitled to qualified immunity.

FIFTEENTH SEPARATE DEFENSE

These Defendants have no custom, plan, or practice to violate the rights of this employee and, therefore, the Complaint should be dismissed.

SIXTEENTH SEPARATE DEFENSE

These Defendants deny having acted in a palpably unreasonable manner.

SEVENTEENTH SEPARATE DEFENSE

Plaintiff's allegations fail to meet the statutory requirements of N.J.S.A. 34:19-1 et seq., and therefore should be dismissed.

EIGHTEENTH SEPARATE DEFENSE

These Defendants have not violated the United States Constitution or the New Jersey State Statutes in any way to deprive Plaintiff of his rights.

NINETEENTH SEPARATE DEFENSE

This action has been commenced by Plaintiff in bad faith and with the intent to harass these Defendants and cost great sums of money to defend the cause of action and, therefore, these Defendants will seek reimbursement for attorney fees and costs pursuant to 42 *U.S.C.* Section 1988 and *N.J.S.A.* 2A:15-591.

TWENTIETH SEPARATE DEFENSE

These Defendants incorporate by reference each and every defense of every co-defendant, named or unnamed, as if set forth at length herein.

TWENTY-FIRST SEPARATE DEFENSE

The Plaintiff's claims are generalized and conclusory and Defendants cannot fully anticipate all the affirmative defenses that may be asserted in the within action. Accordingly, these Defendants reserve the right to interpose such other and further defenses as continuing investigation and discovery may reveal.

LITE DEPALMA
GREENBERG & RIVAS, LLC
Two Gateway Center, 12th Floor
Newark, New Jersey 07102
Attorneys for Defendants,
The City of Patterson [sic],
Mayor Jose Torres, Police Chief
James Wittig, and Police Director
Michael Walker

Dated:
November 28, 2006

/s/ Alberto Rivas
Alberto Rivas, Esq.
Victor A. Afanador, Esq.

DEMAND FOR TRIAL BY JURY

PLEASE TAKE NOTICE that the defendants hereby demand a trial by jury of all issues so triable.

LITE DEPALMA
GREENBERG & RIVAS, LLC
Attorneys for defendants,
The City of Patterson [sic],
Mayor Jose Torres, Police Chief
James Wittig, and Police Director
Michael Walker

/s/ Alberto Rivas
Alberto Rivas, Esq.
Victor A. Afanador, Esq.

Dated: November 28, 2006

DESIGNATION OF TRIAL COUNSEL

PLEASE TAKE NOTICE that Alberto Rivas, Esq. is hereby designated trial counsel in this matter.

LITE DEPALMA
GREENBERG & RIVAS, LLC
Attorneys for defendants,
The City of Patterson [sic],
Mayor Jose Torres, Police Chief
James Wittig, and Police Director
Michael Walker

/s/ Alberto Rivas
Alberto Rivas, Esq.
Victor A. Afanador, Esq.

Dated: November 28, 2006

CERTIFICATION

Pursuant to Local Civil Rule 11.2, it is hereby stated that the matter in controversy is not the subject of any other action pending in any other Court or a pending arbitration proceeding to the best of my knowledge and belief. Plaintiff refers to *Wayne Smith v. City of Paterson, et al.* Civil Action No, 06-2409 in his complaint, but this matter in controversy is not the subject matter of that action.

Respectfully submitted,

THE CITY OF PATTERSON [sic], MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTIG, and POLICE DIRECTOR MICHAEL WALKER

By their attorneys,

Dated:
November 28, 2006

/s/ Alberto Rivas

Alberto Rivas, Esq.
Victor A. Afanador, Esq.
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Facsimile: (973) 623-0211

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 06-CV-03882

JEFFREY HEFFERNAN,

Plaintiff,

vs.

CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTING [sic], and POLICE DIRECTOR MICHAEL WALKER,

Defendants.

DEPOSITION OF:
JEFFREY HEFFERNAN

TRANSCRIPT of the stenographic notes of the proceedings in the above-entitled matter, as taken by and before CYNTHIA A. TEPE, a Certified Court Reporter and Notary Public of the State of New Jersey, held at the offices of LITE, DE PALMA, GREENBERG & RIVAS, LLC., Two Gateway Center, 12th Floor, Newark, New Jersey, on Friday, August 17, 2007, commencing at 10:50 in the morning.

* * *

[53] Q. And what was the retaliatory action that was taken against you?

A. I was demoted, I was punitively placed into the traffic, squad walking, I was denied overtime as per the contract states seniority dictates overtime. I

was denied two assignments to overtime while I was on traffic because the mayor didn't want me there and said, he's not going to work an assignment. So they told me I couldn't show up for the overtime.

Q. How do you know that Mayor Torres was involved in this retaliatory action against you?

A. I was told so.

Q. Who told you this?

A. Lieutenant Papagni and Deputy Chief Fraher.

Q. Now, do you remember when they told you this?

[54] A. They told me April 14th at about 2:00 p.m.

Q. April 14th?

A. Yes.

Q. 2006?

A. Yup.

Q. And what did they specifically say to you, if you recall?

A. Their exact words for me, when I asked why I was being demoted and being transferred, were, you are politically affiliated with Lawrence Spagnola and you can no longer work in this office.

Q. Just so the record is clear, let's go back, because while I understand what happened and you do, the record may not be clear.

What do you specifically mean by being politically affiliated with Larry Spagnola?

A. They said to me because I was placing á sign for my – actually getting a sign for my mother, that I could no longer work in this office because I was politically affiliated with Lawrence Spagnola and his bid to become mayor of the City of Paterson.

Q. Against the current mayor, Jose Torres?

A. Correct.

* * *

[55] Q. Other than the incident that you've referenced in your complaint about getting a sign [56] for your mother, did you do anything else to outwardly support Larry Spagnola in his bid for mayor?

A. No.

Q. Were you working on his campaign?

A. No.

Q. During the time that he was running for this position, did you have conversations with Larry Spagnola?

A. Absolutely.

Q. How often would you speak to him?

A. I spoke to him once or twice, three times a week.

Q. Is he a close personal friend of yours?

A. Yes, he is.

* * *

[59] Q. Turn to Paragraph 17 in your complaint?

A. Paragraph 17?

Q. Paragraph 17, Page 4. What I'd like you to read is – actually read Paragraph 16 through to the next page, to 26.

A. (Reading).

Q. Done?

A. Yes

Q. Your mother already had a sign on her front lawn prior to April 13th correct?

A. Correct.

Q. And she wanted a bigger sign; is that right?

A. Correct.

Q. Where did you get the sign from?

A. Alson [sic] Goew [sic].

Q. And did you call Councilman Goew [sic] to bring you a sign?

A. No.

Q. How did he come to bring you a sign?

A. I went to him.

Q. And where was he?

A. He was up on Union Ave.

Q. Now did you know he was going to be there?

[60] A. Yes.

Q. Hove did you know he was there?

A. I called Officer Jimmy Durkin, who was making the signs at his house.

Q. Was Jimmy Durkin off duty?

A. Yes.

Q. So Jimmy Durkin was working for the Spagnola campaign?

A. I don't know what he was doing, but I know he was making the signs for him.

Q. Okay. So you called Jimmy Durkin, and what happened?

A. I said to him, Do you have any signs? And he said, No. He goes, But I just gave a whole ton of them to Al Goew [sic]. I go, Well, that doesn't help me. I said. Where is he? He goes, He's over on Union Avenue. I said, Union and what? I think he said Union and Berkshire. He's putting them up. Go over there,

grab him, tell him what you want; this way, it saves him trouble to putting the thing up on the east side at your mother's office.

Q. Were you on duty?

A. I was on vacation. I was off duty.

Q. Where were you living on April 13, 2006; in Wayne?

[61] A. Yes.

Q. And were you visiting your mother?

A. Yes.

Q. You weren't working on the campaign that day?

A. I wasn't working on the campaign, period.

MR. FROST: Objection to the form. I don't think he ever testified he was working on the campaign at all.

A. I wasn't.

* * *

Q. And there came a time where you met Councilman Goew [sic] that day, correct?

A. Yes.

Q. And did he have signs?

A. Yes.

Q. And what did you do?

A. I asked him for a sign.

Q. And what happened after that?

A. He said to me, Hold up, I have to – he [62] had huge signs in his truck. I didn't need one that big; it wouldn't even fit in my car. So he said, I have two more to put up, you can have the third sign now. Just sit here and wait. I said okay, and I did.

Q. What happened? Did someone else see you there?

A. Arsinio [sic] Sanchez, who is a motorcycle officer and the mayor's best friend, and bodyguard, drove by and gave a wave. Hey, what's up, buddy. And he pulled over and he spoke to Alson [sic] Goew [sic], and then I proceeded to see Mr. Sanchez go onto his cell phone, and Mr. Goew [sic] came back over to my vehicle and said to me, Don't you work in the chief's office, and I said, Yeah. He says, Well, you'd better get out of here, he says, because you know they hate me and Sanchez is either on the phone with the mayor or the chief. He says, You're up here putting signs up and you're going to have a problem. And I said, I have no problem, I'm not working, number one. And, number two, nobody tells me who I can talk to and who I can't talk to. I got my sign, and I went to my mother's house, dropped it off. I didn't even put it up. Just dropped it off, because I didn't have any tools [63] with me, and I went home. I had my son with me in the car.

* * *

Q. Have you ever heard from anyone else who Arsinio [sic] Sanchez was on the phone with?

A. Yes.

Q. Who?

A. Lieutenant Papagni.

Q. And how did you find that out?

A. Lieutenant Papagni told me so.

Q. When?

A. The day of April 14th in the office.

Q. The same day he told you you were politically affiliated?

A. Correct.

* * *

[66] Q. Did you think about calling Papagni or anyone else?

A. No, absolutely not, because they don't like Spagnola, I knew that, and I said if the bomb is going to drop, drop it.

Q. You said they don't like you. Who is [67] "they"?

A. Chief Witting [sic] don't like Spagnola. Chief Papagni and Deputy Chief Fraher did not like Spagnola. They made it clear to me on several occasions while I worked in that office how they disliked

him for numerous reasons and that I was crazier for being his friend.

Q. Because they all knew you were friends with him?

A. Absolutely.

* * *

[132] Q. Tell me in your own words how your first amendment violations were violated.

A. Well, I feel that I was retaliated against, I was demoted, I was harassed, I was threatened, continued to be because of my affiliation with Larry Spagnola. I lost money, I'm sick, I continue to get worse, sick with my stomach conditions. Now I have colitis on top of everything else because of the nerves and the worry, all because of a friendship with a man that I've had for 25 years.

Q. What I'd like to do is, in a little bit, we're going to close out with your damages, in which I'm going to ask you about the money you lost, and your physical ailments, but I just want to ask a little more follow-up questions on the first amendment violations and your SEPA [sic] claims, as well.

A. Okay.

Q. And the first amendment violation that you're particularly relying upon is the right to post a sign of someone that you were supporting for [133] mayor, correct?

A. I wasn't supporting him for mayor.

Q. I apologize. Let me rephrase that. That your mother was supporting for mayor?

A. Yes.

Q. Now, you couldn't vote for Larry Spagnola could you?

A. No.

Q. Because you weren't a resident of the City of Paterson?

A. Correct.

Q. But you were, in fact, going to post a sign on your mother's lawn?

A. No. I was going to pick it up and bring it to her. I wasn't going to post it. I didn't have tools with me. My older brother can take care of that.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
DOCKET NO. 06-CV 03882

JEFFREY HEFFERNAN,

Plaintiff,

vs.

CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTING [sic], and POLICE DIRECTOR MICHAEL WALKER,

Defendants.

Deposition of:
JAMES WITTING [sic]

TRANSCRIPT of testimony as taken by and before ALLYSON MICHELLE CACIOLI, a Shorthand Reporter and Notary Public of the State of New Jersey, at the offices of LITE, DePALMA, GREENBERG & RIVAS, Two Gateway Center, 12th Floor, Newark, New Jersey 07102, on Wednesday, August 22, 2007, commencing at 11:50 a.m. in the morning.

* * *

[73] Q. And why was he transferred?

A. For the good of the department.

Q. Who gave the order to transfer him?

A. I did.

Q. Why did you feel it was necessary to transfer him "for the good of the department"?

A. Because of Jeffrey's overtly involvement in a political election, which was taking place in the city.

Q. What election was that?

A. The election for mayor.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
DOCKET NO. 06-CV 03882

JEFFREY HEFFERNAN,
Plaintiff,
v.
CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTING [sic] and POLICE DIRECTOR MICHAEL WALKER,
Defendants.

DEPOSITION UNDER ORAL EXAMINATION OF
ASLON GOOW, SR.
Paterson, New Jersey
January 9, 2008

* * *

[16] Q. Okay.

A. So while we were there, you know, we were concerned that if someone, somebody saw any police-officers helping me specifically in this campaign, that they would be targeted.

Q. And why would you feel that?

A. Because that's the political climate around here. Certain people feel that you should be loyal to a certain party. If you are a police-officer you should be with whomever is with, you know, the police department. Or if you're a fireman, they would hope that you were with whoever the majority of the firemen were with.

But that wasn't the case here. The police department was pretty divided. The firemen also divided. Everybody had their choice of who they wanted to support. But there are political ramifications. And it was clearly evident to me that had anybody seen Jeff Heffernan out there with us it would have looked like he was putting up the signs.

Q. But was he putting up any signs?

A. No.

Q. Okay.

A. At that moment I had told him, I [17] said, Jeff, I think it's better that, you know, I give you the sign later or you come back later, I said, because if somebody comes by and sees you out here were going to have problems.

And no sooner than I said that Officer Sanchez pulled up on his motorcycle.

* * *

[18] I know firsthand that Arsenio Sanchez was supporting our present mayor at the time.

So with that in mind, Officer Sanchez just pulled away on his motorcycle and I immediately picked up my cell phone and I called Officer Sanchez, and he responded back to me. And I asked him, I said, you know, how are you doing. He said, I'm doing good. I said, why did you drive by like that? I said, why didn't you stop and say hello. He says, he goes, oh, it didn't look like you wanted to say hello to me. I said, well, why don't you come back.

So he came back. He wasn't far. He was just going down the road. So he came back to the scene. And I said to him, I made it very clear and blunt to him, I said, listen, Arsenio, I said, I'm a big supporter of Larry Spagnola. I'm his campaign manager. I said, you're a big supporter of Mayor Torres. I said, let's not let our personalties [sic] be a conflict here. You can support whoever you want and we can support whoever we want and let's leave it at that. Because in the end somebody is going to win and we don't want to have any political ramifications come out of this.

* * *

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STEVEN S. SIMRING
MD, MPH

January 7, 2009

Victor A. Afanador, Esq.
Lite, DePalma, Greenberg, and Rivas, LLC
Attorneys at Law
2 Gateway Center, 12th Floor
Newark, New Jersey 07102

Re: Jeffrey J. Heffernan

Dear Mr. Afanador,

At your request, I have examined Officer Jeffrey J. Heffernan at my office on 12/09/08. The session lasted 3.5 hours. The purpose of this evaluation was to assess this patient's claims of emotional damages related to his employment. I have also reviewed the following background material:

1. Medical reports
   (a) Philip Bai, MD (psychiatrist), 6/28/06, 7/24/06, 8/31/06, 10/09/06, 1/30/07, with office notes, 6/06-9/08
   (b) William B. Head, Jr., MD (psychiatrist), 9/06/06, 3/22/07, 3/23/07
   (c) Bertram T. Rotman, PhD (clinical psychologist), 1/31/02
2. Paterson Police Department employment records, 1985-2007

3. Plaintiff's answers to interrogatories, 3/09/07

4. Deposition of Jeffrey Heffernan, 8/17/07

* * *

He was brought to my office by his brother-in-law, who waited outside. He understood that I was a psychiatrist retained by the defense in his civil lawsuit against his employer. He understood the limits of confidentiality in a forensic evaluation.

* * *

Mr. Heffernan believes that his problems with the Paterson Police Department began with a minor incident on 4/10/06. He explained to me that former Chief Larry Spagnola was running for mayor against incumbent mayor Jose Torres. Mr. Spagnola was an old friend of his mother, but Mr. Heffernan insisted that he took no position in the election. He told me that he picked up a Spagnola lawn sign only because his mother asked him to do so. He believes that the mayor's close associate Arsenio Sanchez saw him with Councilman Alson [sic] Goew [sic] when he was carrying the sign.

* * *

He tried to explain that he was only delivering a sign, and that he had taken no position in the election. He told me that none of his explanations were accepted, because his behavior with the sign was interpreted as an indication of disloyalty.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY J. HEFFERNAN,	**CIVIL ACTION**
Plaintiff,	**NO. 06-3882 (PGS)**
v.	
CITY OF PATERSON, et al.,	
Defendants.	

PLAINTIFF JEFFREY J. HEFFERNAN'S MOTION FOR THIS COURT TO FIND AS A MATTER OF LAW THAT THE PLAINTIFF ENGAGED IN PROTECTED SPEECH

(Filed Jan. 26, 2009)

Plaintiff, Jeffrey Heffernan, by and through his undersigned counsel, respectfully moves the Court to find as a matter of law that the Plaintiff engaged in protected speech. Plaintiff further requests that at trial the Judge instruct the jury, at the appropriate time, that Plaintiff's political activity of picking up a campaign sign is a protected activity as a matter of law and the Court has decided that Plaintiff engaged in First Amendment Activity. Additionally, Plaintiff requests that the verdict slip and jury instructions reflect this finding.

* * *

II. PLAINTIFF'S SPEECH IS PROTECTED BY THE FIRST AMENDMENT

* * *

C. Freedom of Association.

Plaintiff's family has long been friends with the Spagnola family. Plaintiff drove into Paterson to collect a yard sign supporting Lawrence Spagnola, the former Chief of Police in Paterson, in the May 2006 mayoral election. Plaintiff was with his son and not in uniform when he met with Paterson City Councilman Aslon Goow in the City of Patterson [sic], where Goow was delivering campaign signs to Spagnola supporters. Goow was Spagnola's mayoral campaign manager. (Deposition of Goow at 18). Plaintiff had the right the associate with whoever he wanted to while off duty. See *Perez v. Cucci*, 725 F. Supp. 209 (3d Cir. 1989).

The first and fourteenth amendments also protect an individual's right to exercise freedom to associate with others for the common advancement of political beliefs and ideas. *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 38 L. Ed. 2d 260, 94 S. Ct. 303 (1973). See also *Lyng v. International Union*, UAW, 485 U.S. 360, 108 S. Ct. 1184, 1190 n.5, 99 L. Ed. 2d 380 (1988) (reviewing decisions in which the Court held that individual associational rights must be free from governmental interference). The right to associate with the political party of one's choice and support its platforms and candidates is an integral part of this basic constitutional freedom. *Kusper*, 414 U.S. at 57

* * *

III. CONCLUSION

In light of the foregoing, Plaintiff, Jeffrey Heffernan, by and through their undersigned counsel, respectfully moves the Court to find as a matter of law that the Plaintiff engaged in protected speech.

Respectfully Submitted,

s/ Mark B. Frost, Esquire
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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY J. HEFFERNAN,	:	**CIVIL ACTION**
Plaintiff,	:	**NO. 06-3882 (PGS)**
v.	:	
CITY OF PATERSON, et al.,	:	
Defendants.	:	

PLAINTIFF JEFFREY HEFFERNAN'S TRIAL BRIEF

(Filed Feb. 9, 2009)

* * *

B. Freedom of Association.

Plaintiff's family has long been friends with the Spagnola family. Plaintiff drove into Paterson to collect a yard sign supporting Lawrence Spagnola, the former Chief of Police in Paterson, in the May 2006 mayoral election. Plaintiff was with his son and not in uniform when he met with Paterson City Councilman Aslon Goow in the City of Patterson [sic], where Goow was delivering campaign signs to Spagnola supporters. Goow was Spagnola's mayoral campaign manager. (Deposition of Goow at 18). Plaintiff

had the right the [sic] associate with whoever he wanted to while off duty. See *Perez v. Cucci*, 725 F. Supp. 209 (3d Cir. 1989). (See Plaintiff's Motion for this Court to Find as a Matter of Law that Plaintiff Engaged in Protected Speech, attached hereto as Exhibit "A").

* * *

D. Plaintiff's Protected Conduct Was a Substantial and Motivating Factor in His Disciplinary Action.

The third prong requires a showing that Plaintiff's protected speech was a substantial or motivating factor in his retaliatory transfer. *Mt. Healthy School District Board of Educ. v. Doyle*, 429 U.S. 274 (2000), *Howard v. Board of Educ. of the City of East Orange*, 90 Fed. Appx. 571 (3d Cir. 2003).

* * *

III. CONCLUSION

In light of the foregoing, Defendants violated the provisions of 42 U.S.C. § 1983, in that Defendants, acting under color of State law, deprived Plaintiff of the privileges and immunities secured to him by the First and Fourteenth Amendments of the United States Constitution and, in particular, his right to hold employment without infringement of his First Amendment right to freedom of speech by demoting him in direct retaliation for his exercise of protected activities.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN Plaintiff, vs. CITY OF PATERSON, et als., Defendants.	OPINION

Trenton, New Jersey
Friday, April 3, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.

APPEARANCES:

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record taken stenographically in the above entitled proceedings.

* * *

[3] On the afternoon of August 14th, plaintiff went to the chief's office to collect his personal belongings and at that point Papagni and Deputy Chief Fraher, advised Heffernan that he "was not being transferred because of his job performance but he was being transferred because of his political affiliations."

That's more like association rights as opposed to a speech right. Chief Wittig stated I guess around the same time that he transferred plaintiff to traffic because of his "overtly involvement in the political election." Again that seems like association as opposed to a comment about police officer Heffernan's speech.

* * *

[4] So based on the law of the 1st Amendment, especially dealing with the right of association, I find that the plaintiff meets the burden to file and to pursue a 1983 action under that provision.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN
Plaintiff,
-vs-
CITY OF PATERSON, et als.,
Defendants.

VOLUME 1

Trenton, New Jersey
Monday, April 6, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.
and a Jury

APPEARANCES:

FROST & ZEFF, ESQS.
BY: MARK B. FROST, ESQ.,
ANGELA D. GRAMPOLE, ESQ.,
For the Plaintiff.

LITE, DE PALMA, GREENBERG & RIVAS, ESQS.,
BY: VICTOR A. AFANADOR, ESQ.
-and-
DWYER, CONNELL & LISBONA, ESQS.
BY: ALBERT C. LISBONA, ESQ.
For the Defendants.

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an

accurate record taken stenographically in the above-entitled proceedings.

* * *

[1.2] INDEX

WITNESS DIRECT CROSS REDIRECT RECROSS

PATRICK GRECO
By Mr. Frost: 1.3

---

* * *

[1.3] PATRICK GRECO, having been duly sworn, testifies as follows:

* * *

[1.6] Q Now, Sergeant Greco, did you happen to hear a conversation that took place on April 13th involving Lieutenant Papagni?

[Objection Omitted]

THE WITNESS: Yes.

* * *

Did you hear a conversation involving Lieutenant Papagni while you were in the office on the 13th?

[Objection Omitted]

[1.7] A Yes.

* * *

Q After you heard that portion of the conversation, what did you eventually ask Lieutenant Papagni?

A What had happened.

* * *

[1.8] Q Prior to asking Lieutenant Papagni, can you tell us what you heard in that conversation?

A I heard Lieutenant Papagni become upset and loud during the phone conversation.

[Objection Omitted]

A During that, he said, "He did what," in a loud boisterous fashion. That's all I really could hear in a clear version.

Q And did you speak to Lieutenant Papagni after the conversation?

A Not immediately after.

Q Shortly thereafter, did you speak to him?

A Yes.

Q And what did you say to him?

A "What had happened? What happened?"

Q Did he tell you what happened?

A Yes.

Q What did he tell you?

A He told me that he had received a call from the mayor in regards to Jeffrey Hefferman [sic].

[1.9] Q And did he say anything else?

A That Jeff had been seen with putting up a sign, with a political sign, and that I think Arsenio had seen him with the sign.

Q Arsenio is who?

A I'm sorry. He's, actually I think he was a detective at the time. Detective Arsenio Sanchez. He's assigned to the mayor's office. He had called the mayor, told him that he saw Jeff with the sign and I think Jeff was putting it at his mother's house. That's why the mayor was upset. The mayor was very upset about it and he called Lieutenant Papagni.

[Objection Omitted]

Q Now, did Lieutenant Papagni say anything as to what was going to happen to Officer Heffernan as a result of being involved in picking up this campaign sign?

A He had mentioned that the mayor had said – being upset, that he wanted him disciplined and moved immediately.

Q Okay. Did you know whether, in fact, Officer Heffernan was transferred and moved immediately from the chief's office?

A It wasn't at that very moment. It did occur though.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN Plaintiff, -vs- CITY OF PATERSON, et als., Defendants.	VOLUME 2

Trenton, New Jersey
Tuesday, April 7, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.
and a Jury

Appearances:

FROST & ZEFF, ESQS.
BY: MARK B. FROST, ESQ.,
ANGELA D. GRAMPOLE, ESQ.,
For the Plaintiff.

LITE, DE PALMA, GREENBERG & RIVAS, ESQS.,
BY: VICTOR A. AFANADOR, ESQ.
-and-
DWYER, CONNELL & LISBONA, ESQS.
BY: ALBERT C. LISBONA, ESQ.
For the Defendants.

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an

accurate record taken stenographically in the above-entitled proceedings.

* * *

[2.2] INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
ARSENIO SANCHEZ:				
By Mr. Frost:	2.8		2.41	
By Mr. Afanador:		2.38		
PATRICK GRECCO				
By Mr. Frost:	2.45		2.88	
By Mr. Lisbona:		2.61		2.92
ASLON GOOW				
By Mr. Frost:	2.101		2.144	
By Mr. Afanador:		2.126		
RAYMOND HEFFERNAN				
By Mr. Frost:	2.147		2.167	
By Mr. Lisbona:		2.158		

* * *

[2.5] THE COURT: Let me see what else is there.

I had the issue from Mr. Afanador with regard to the surprise as this being an association case as opposed to a speech case. I do note one interesting issue and I didn't know – but there was a case last year Judge Simandle [sic]. Had by a police officer against a police chief. In that case, although it was an association case, the chief was demoted or did something to this officer because of his relationship with

the union. But at any rate, the judge charged it's as an affiliation case but throughout his opinion he talked about the speech parts of it so it was kind of a combination of both of them. I just want to let you know that. But at any rate, my view – and I read the Shultz versus Calli case and the Warner versus – 267 F.3d 288. The Warner case the problem was that there were insufficient facts disclosed prior to trial in a security transaction. We don't have that here. Discovery was [2.6] entirely complete. All parties had all the facts that were necessary for them to proceed. So, I don't see that the case is like the Warner case.

With regard to the Shultz v. Calli, that's an interesting case because it goes into a lot of different things and one of them was, the plaintiff pled jurisdiction incorrectly and somehow it came up during the trial I guess and then at the end of it, it became a huge issue if there was a federal case involved. At any rate, it was sent back down to the District Court to comply with its turn-around. But the truth of the matter was that there was insufficient pleadings and there was a hole in the case as to a number of facts and the pleading of them.

In this case, we don't have that either. We have a case where discovery was substantial. A number of people were deposed. There was a final pretrial order. The final pretrial order set up the issue with regard to association and speech. I got two motions on that

summary judgment from the defendant and a motion in limine, I think, it was from the plaintiff asking me to declare that there was a violation of the First Amendment and he put it in different terms, one on association and one on free speech. But both the parties knew the scope of the issue. Everybody had time to plead their cases and to put their defenses and the plaintiff putting forth his case with more than reasonable time.

[2.7] So, I don't see from the cases cited would be controlling in this case and I'm going to allow the case go forward as it is.

* * *

[2.104] ASLON GOOW, SR., having been duly sworn, testifies as follows:

* * *

[2.140] Q Isn't it true that Mr. Heffernan never participated during – in this Spagnola campaign for mayor?

A No, that's not true.

Q Didn't you indicate in your deposition transcript that he never supported the campaign other than just pick up a sign for his mother?

A I don't have the deposition in front of me. I might have said that. He was a supporter of Mr. Spagnola.

* * *

[2.150] RAYMOND HEFFERNAN, having been duly sworn, testifies as follows:

* * *

[2.150] Q Now, sir, what is your relationship to Officer Jeff Heffernan?

[2.151] A That's my brother.

Q Officer Heffernan, did you have an opportunity to go to the chief's office on Friday, April the 14th, 2006?

A Yes, I did.

Q How did that come about?

A My sister-in-law called me and told me my brother was called into the chief's office, and she was afraid something was wrong; asked me to go down there to see make sure everybody was okay.

Q About what time of day was that? Do you recall?

A I'm going to say maybe late morning, early afternoon.

Q Did you go down to the chief's office?

A Yes, I did.

Q When you arrived at the chief's office, can you tell me who was there?

A My brother was there. Lieutenant Papagni and Deputy Chief Fraher.

Q When you arrived, can you tell us what was going on?

A My brother and the lieutenant were in a heated debate almost argument.

Q Could you hear what the argument was about?

A Yes.

Q What was it about?

A Apparently, what I found out after the fact, Lieutenant Papagni was moving my brother from the chief's office because of him obtaining a sign for my mother's lawn.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN Plaintiff, -vs- CITY OF PATERSON, et als., Defendants.	VOLUME 3

Trenton, New Jersey
Wednesday, April 8, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.
and a Jury

Appearances:

FROST & ZEFF, ESQS.
BY: MARK B. FROST, ESQ.,
ANGELA D. GRAMPOLE, ESQ.,
For the Plaintiff.

LITE, DE PALMA, GREENBERG & RIVAS, ESQS.,
BY: VICTOR A. AFANADOR, ESQ.
-and-
DWYER, CONNELL & LISBONA, ESQS.
BY: ALBERT C. LISBONA, ESQ.
For the Defendants.

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an

accurate record taken stenographically in the above-entitled proceedings.

* * *

[3.2] INDEX

WITNESS DIRECT CROSS REDIRECT RECROSS

JEFFREY HEFFERNAN
By Mr. Frost: 3.30 3.174
By Mr. Afandor [sic]: 3.127

* * *

[3.30] JEFFREY HEFFERNAN, having been duly sworn, testifies as follows:

* * *

[3.38] Q Now, sir, did you have a past relationship with the former chief of the police, Laurence Spagnola?

A Yes, I did.

Q Can you tell me what that relationship was?

A Personal.

Q When you say, "personal," can you explain that?

A He's my mother's second cousin. All through my tenure with the police department, Laurence Spagnola and I met and where [sic] friends ever since all through his rankings.

Q And did you support his candidacy for mayor during the mayoral election in 2006?

A I wanted him to win.

* * *

Q Now, I want to draw your attention to April the 13th. Can you tell us where you went on that day?

[3.39] A I went to my mom's house.

* * *

Q Make any request of you that day?

A Yes. While I was there, she was complaining about a few things, and one of them was that somebody had stolen her Laurence Spagnola sign for mayor off the lawn. It was a small one. She asked me if I could reach out to Mr. Spagnola to see if I can –

[Objection Omitted]

Q Did you do that?

[3.40] A Yes. I placed a phone call to the person I knew who he was making the signs and asked them if he could, in fact, deliver a sign to her.

And he said it would be much easier if I could come up, meet Councilman Goow, who was putting signs up in the Hillcrest Section of town, pick it up and deliver it back to her house, it would help them out, and I agreed.

Q And did you pick up the sign?

A Yes, I did.

Q Where did you go to pick up the sign?

A I believe it was Union and Berkshire, one of those side streets up there, Union and something.

Q And who was with you that day?

A My son Jeffrey.

* * *

[3.42] Q Tell us what happened when you got to the area of Union, Berkshire and Maitland Avenue.

A I was met by Councilman Aslon Goow, who was up there putting signs on the neighbors' lawns. I asked him, Jimmy Dirkin (phonetic), the person I had originally called for the sign, said to met [sic] you up here, you have a sign for me for my mother's lawn.

He said, how big do you want the sign?

I explained to him it had to fit in a truck. I have a Ford Explorer.

He had three or four very large signs that would have fit in my truck. He said to me, stick around for a few minutes, I have two or three more neighbors I have to knock on their door if he could place those signs on their lawn. You could have the fourth sign, I believe it was.

I waited around. I picked up my sign.

Q Thank you.

Now, while you were there, did you have an opportunity to see any police officers?

A Yes, I did.

Q Who did you see?

A I saw Officer Arsenio Sanchez.

Q What was Arsenio Sanchez doing?

[3.43] A He was coming around the corner, one of the side streets, onto Union Avenue on his police motorcycle.

Q And did you have any conversation with him?

A I just gave him, you know, how you doing (indicating).

Q Now, do you know Officer Sanchez?

A Yes.

Q And do you know who he supported in the campaign?

A Absolutely. Mayor Torres.

Q How do you know that?

A He told me so.

* * *

Q Now, with respect to picking up the sign, did you pick up your sign?

A Yes, I did.

Q Where did you take it?

A Back to my mom's house.

* * *

[3.44] Q When you got to your mother's home, what did you do then?

A I put the sign in the backyard, and then my son and I, we helped her with a few personal items, because she's bedridden, you know, couple hours there, and then we left.

* * *

Q By the way, about what time of day did you go pick up the signs?

A Twoish, two o'clockish.

* * *

[3.45] Q Okay. Now, did you have an opportunity to call one of the officers that you worked with later that afternoon?

A Yes, I did.

[3.46] Q And what officer is that?

A Detective Johnny Maes.

* * *

Q With respect to your records there, can you show us what [3.47] time that was?

A 4:14 p.m.

* * *

Q Did you have any conversations with Detective Maes prior to 4:14 on the 13th?

A No.

Q When you called him, can you tell us what happened?

[Objection Omitted]

A. I spoke to John and, you know, asked: What are you doing? Blah, blah, blah.

THE COURT: Wait a second. You said "blah, blah, blah"?

A. That's how we started the conversation.

Q Say the crux of the conversation.

A I asked him if he wanted to go to Duffy's for a hamburger and a beer.

He said to me no, he wasn't working.

I said I thought you were working today.

He said no. He said: What are you doing?

I said: What do you mean? I heard you're putting up [3.48] signs for Spagnola.

I said: Who did you hear that from?

He says, it doesn't matter. I got a phone call from the chief's office. I don't want to tell you. That's what I heard.

I said: No. That's what I'm doing. I just came from my mother's house.

MR. AFANADOR: Objection to what Officer Maes may have heard. He can only testify as to his direct conversation with John Maes.

THE COURT: Why don't you just tell us what Maes said to you.

A That's exactly what he said. I know he received a phone call from the chief's office. The person in the chief's office relayed to him that I was putting signs up all over the city of Paterson for Larry Spagnola.

I said I had not been doing that. I was picking a sign up for my mother, and that's all I was doing.

He said: Well, I'm telling you all hell is breaking loose in the office, and you're out of the chief's office. He suggested to me that I may want to place a phone call to somebody of a higher authority and see if I can rectify the situation. Which I didn't.

* * *

[3.51] Q And when you went down to the chief's office, who did you intend to speak to?

A Lieutenant Papagni.

Q Why him as opposed to the chief or somebody else?

A Well, I asked for the chief of police. I was told I would not be granted access to him. And Lieutenant Papagni said: I'm here. You'll speak to me.

And the heated argument, he repeated why I was being transferred.

What did I do wrong? Was it a – I did something with my work performance? Something that I did that I don't know about, that I should know about?

I was told no. You were politically involved putting up signs. You can no longer work in this office. You are out.

Q This is conversation you had at the office, or is this still on the phone?

A This is at the office.

Q So you're at the office now having this conversation with Lieutenant Papagni?

A Correct.

Q And after he made those statements to you, what did you say?

A I said to him I wasn't politically involved. I was just [3.52] picking a sign up for my mom.

I says: I don't understand. What did I do wrong to deserve this?

He says: Listen, this is not from me. This is from the mayor. He says the mayor called the chief. The chief called me.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN Plaintiff, -vs- CITY OF PATERSON, et als., Defendants.	VOLUME 5

Trenton, New Jersey
Friday, April 10, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.
and a Jury

APPEARANCES:

FROST & ZEFF, ESQS.
BY: MARK B. FROST, ESQ.,
ANGELA D. GRAMPOLE, ESQ.,
For the Plaintiff.

LITE, DE PALMA, GREENBERG & RIVAS, ESQS.,
BY: VICTOR A. AFANADOR, ESQ.
-and-
DWYER, CONNELL & LISBONA, ESQS.
BY: ALBERT C. LISBONA, ESQ.
For the Defendants.

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an

accurate record taken stenographically in the above-entitled proceedings.

* * *

[5.2] INDEX

WITNESS DIRECT CROSS REDIRECT RECROSS

JAMES WITTIG
By Mr. Frost: 5.3

* * *

[5.3] JAMES WITTIG, having been duly sworn, testifies as follows:

* * *

[5.39] Q Before you made the transfer, you got the information that Jeff was out hanging political signs with Councilman Goow from Lieutenant Papagni. Is that correct?

[5.40] A Correct.

Q And you based your transfer on that information. Is that correct?

A Correct.

* * *

[5.48] Q So we've established that with respect to Officer Heffernan, he was not on duty. Is that right?

A Correct.

Q Wasn't wearing a uniform?

A Correct.

* * *

Q Now, can you tell me as a clerk in your office and being off duty that day, how it conflicted with his duties on that day?

A It was the perception that Jeffrey was involved in a political campaign.

Q I'm asking how it conflicted with his duties.

A Because Jeffrey was supposed to be perceived. He was in the Chief's office.

He was advised not to try – get involved with politics. Try to keep politics out of the office.

It was a thing of trust. Jeffrey betrayed my trust when he got involved. He gave me his word he wasn't involved in the political campaign. He was advised whatever happens in the [5.49] Chief's office is of a confidential nature, it stays within the Chief's office.

Just the perception what Jeffrey did indicated that he broke my trust. Jeffrey had to go.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO: 06-3882

JEFFREY J. HEFFERNAN Plaintiff, -vs- CITY OF PATERSON, et als., Defendants.	VOLUME 6

Trenton, New Jersey
Monday, April 13, 2009

BEFORE:

HONORABLE PETER G. SHERIDAN, U.S.D.J.
and a Jury

APPEARANCES:

FROST & ZEFF, ESQS.
BY: MARK B. FROST, ESQ.,
ANGELA D. GRAMPOLE, ESQ.,
For the Plaintiff.

LITE, DE PALMA, GREENBERG & RIVAS, ESQS.,
BY: VICTOR A. AFANADOR, ESQ.
-and-
DWYER, CONNELL & LISBONA, ESQS.
BY: ALBERT C. LISBONA, ESQ.
For the Defendants.

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an

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* * *

[6.3] JAMES WITTIG resumes the stand, having been previously sworn, and testifies as follows:

* * *

Q Your testimony on Friday was that Jeff was overtly involved in the political campaign. Is that correct?

A Correct.

* * *

[6.16] Q Now, you transferred Officer Heffernan in the middle of a detail. Is that correct?

A Jeffrey, yes.

Q As soon as this happened, you had him transferred. Is that right?

A That's correct.

Q And, sir, with respect to having him transferred, you're the one who actually gave him the assignment for walking. Is that correct?

A Yes.

Q And with respect to the assignment, you could have assigned him anywhere, couldn't you?

A Yes.

Q But you chose to put him in walking. Is that right?

A Yes.

* * *

[6.79] But with respect to the day-to-day operations of the department, you're responsible for that. Correct?

A That's my responsibility.

Q So, with respect to details and changes, none of that needs to be approved by the director of police. Right?

A That's correct.

Q You make those decisions, and you transfer people, and it doesn't have to go to the administration. Is that correct?

A That is correct.

Q You didn't have to run any decision for transferring offices to Mayor Torres. Right?

A That is correct.

* * *

[6.91] Q Isn't it true that officers aren't entitled to any particular assignments?

A That's correct. When you take the job as a police officer, you sign up to be a police officer. All the different jobs are just different jobs within the police department itself.

* * *

[6.93] Q Chief before we broke, you recall we were talking. about transfers that occurred on particular – throughout your career. Correct?

A Yes.

Q And isn't it true that as chief you implement a lot of detail transfers on a regular basis. Correct?

A That's correct.

Q Isn't it true that every detail change always has officers moving throughout the police department. Correct?

A Yes.

* * *

[6.136] PATRICK PAPAGNI, having been duly sworn, testifies as follows:

* * *

[6.142] Q Now, sir, I just want to direct your attention to April 13th, 2006. Did you ever learn that Officer Heffernan was involved in some type of political activity?

A Yes.

Q And when you learned that, did you learn that from a Detective Maes?

A Yes, Detective Maes confided in me.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEFFREY HEFFERNAN Plaintiff, v. CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTING [sic] and POLICE DIRECTOR MICHAEL WALKER, Defendants.	Civil Action No. 06-3882 (DMC) (JAD) **STATEMENT OF UNDISPUTED MATERIAL FACTS PURSUANT TO F.R.C.P. 56.1(A) IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT** (Filed Mar. 8, 2013)

A. Procedural background

1. On August 17, 2009, Plaintiff filed a two count Complaint against Defendants.[1] (*See* Certification of Victor A. Afanador ("Afanador Cert."), Exhibit ("Ex.") A – Complaint.)

[1] Count II of Plaintiff's Complaint, which asserted a claim under the Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* 34:19-1, *et seq.*, was voluntarily dismissed with prejudice. (ECF No. 172.)

In addition, please note that Plaintiff voluntarily dismissed all claims against Defendant Police Director Michael Walker. (*See* Afanador Cert., Ex. F – Final Pre-Trial Order at Section 15.)

2. Count I of the Complaint alleges that "Defendants intentionally, wilfully [sic], and recklessly transferred Plaintiff in order to deny Plaintiff his First Amendment **right to free speech**." (*Id.* at ¶41.) (Emphasis added.)

3. On January 26, 2009, after discovery was completed, Plaintiff filed a motion for summary judgment, which was improperly characterized as a motion *in limine*, moving the Court to find as a matter of law that Plaintiff engaged in protected speech. (*See* Afanador Cert., Ex. B – Plaintiff's motion *in limine* at p. 1.)

4. Also on January 26, 2009, Defendants filed a motion for summary judgment, which was limited to Plaintiff's First Amendment freedom of speech claim – the only claim pled in Plaintiff's Complaint. (*See* Afanador Cert., Ex. C – Defendants' summary judgment motion.)

5. The Honorable Peter G. Sheridan, U.S.D.J. did not allow the parties to file opposition briefs to these motions.

6. The limited relief sought in Plaintiff's motion was a finding "as a matter of law that the Plaintiff engaged in protected **speech**." (*See* Afanador Cert., Ex. B – Plaintiff's motion *in limine* at p. 1.) (Emphasis added.)

7 The first point heading in Plaintiff's brief was listed as: "Plaintiff's **speech** is protected by the First Amendment." (*Id.* at p. 3.)

8. However, for the first time throughout the course of this litigation, Plaintiff included two paragraphs in the *in limine* motion setting forth the case law for a freedom of association claim, a claim that Plaintiff did not plead in his Complaint or otherwise preserve or pursue throughout this litigation. (*See id.* at pp. 11-12.)

9. Despite the fleeting mention of freedom of association case law, in the Conclusion section of the *in limine* motion, Plaintiff "respectfully move[d] the Court to find as a matter of law that the Plaintiff engaged in protected **speech**." (*Id.* at p. 13.) (Emphasis added.)

10. Since Judge Sheridan ruled that the parties were not able to file oppositions or responsive briefs to the motions for summary judgment, Defendants were not able to object to Plaintiff's attempt to include a newly asserted cause of action in his brief.

11. On February 9, 2009, Plaintiff filed a Trial Brief. (*See* Afanador Cert., Ex. D – Plaintiff's Trial Brief.)

12. In the Trial Brief, Plaintiff argued that his "**speech** is protected by the First Amendment" and requested the Court "to find as a matter of law that Plaintiff engaged in protected **speech**." (*Id.* at p. 6.) (Emphasis added.)

13. Plaintiff included a paragraph in his Trial Brief setting forth law on a freedom of association claim, despite the fact that it was not pled in the

Complaint or otherwise preserved or pursued throughout this litigation. (*See id.* at p. 7.)

14. Even though Plaintiff included case law for a new cause of action in the Trial Brief, Plaintiff limited his relief to contend that he was deprived of "his First Amendment right to **freedom of speech**. (*Id.* at p. 12.) (Emphasis added.)

15. Defendants filed a Trial Brief on the same day that Plaintiff filed his Trial Brief. (*See* Afanador Cert., Ex. E Defendants' Trial Brief.)

16. Defendants' Trial Brief was limited to the sole cause of action pled in the Complaint – the freedom of speech claim. (*See id.*)

17 On February 24, 2009, the parties filed the Final Pre-Trial Order. (*See* Afanador Cert., Ex. F – Final Pre-Trial Order.)

18. In the Final Pre-Trial Order, Plaintiff listed as a contemplated motion "for this Court to find as a matter of law that the Plaintiff engaged in protected **speech**." (*Id.* at p. 2.) (Emphasis added.)

19. Nowhere in the Final Pre-Trial Order was a freedom of association claim listed, must less mentioned, by Plaintiff. (*See id.*)

20. In Plaintiff's Contested Facts portion of the Final Pre-Trial Order, he advised that he intended to prove contested facts with regard to damages, which included "Plaintiff suffered emotional distress when Defendants intentionally, willfully, and recklessly

transferred Plaintiff in order to deny Plaintiff his First Amendment right to **free speech**"; "Plaintiff suffered compensatory and equitable damages as a result of Defendants intentionally, willfully, and recklessly transferring Plaintiff in order to deny Plaintiff his First Amendment right to **free speech**"; and "[t]he Police department [sic] failed to promote Plaintiff to Sergeant as a result of Plaintiff exercising his First Amendment right to **free speech**." (*Id.* at p. 11.) (Emphases added.)

21. In the Final Pre-Trial Order, Plaintiff failed to mention any claim based upon a freedom of association violation. (*See id.*)

22. Furthermore, in the Final Pre-Trial Order, Plaintiff listed his legal issues as:

> 2. Whether defendants violated the provisions of 42 U.S.C. § 1983, in that defendants, acting under color of State law, deprived plaintiff of the privileges and immunities secured to him by the First and Fourteenth Amendments of the United States Constitution and, in particular, his right to hold employment without infringement of his First Amendment right to **freedom of speech**.
>
> 3. Whether defendants intentionally, wilfully [sic], and maliciously transferred plaintiff in order to deny plaintiff his First Amendment right to free speech.

(*Id.* at p. 43.) (Emphases added.)

23. Notably, Plaintiff never asserted a freedom of association claim as a legal issue in the Final Pre-Trial Order. (*See id.* at p. 42.)

24. On April 3, 2009, the eve of trial, Judge Sheridan granted Defendants' summary judgment motion in part and denied same in part. (*See* Afanador Cert., Ex. G – April 3, 2009 Order.)

25. In rendering the decision, Judge Sheridan held that "[t]hat's more like association rights as opposed to a speech right." (*See* Afanador Cert., Ex. H – April 3, 2009 Transcript at 3:7-8.)

26. In addition, Judge Sheridan held "[a]gain that seems like association as opposed to a comment about police officer Heffernan's speech." (*Id.* at 3:10-12.)

27. In conclusion, Judge Sheridan held "[s]o based on the law of the 1st Amendment, especially dealing with the right of association, I find that the plaintiff meets the burden to file and to pursue a 1983 action under that provision." (*Id.* at 4:17-20.)

28. Judge Sheridan then dismissed Plaintiff's freedom of speech claim, but permitted Plaintiff to proceed with a freedom of association claim. (*See id.* at 3:7-8; Ex. G – April 3, 2009 Order.)

29. On April 7, 2009, defense counsel made motions to dismiss the freedom of association claim or, in the alternative, a motion for a continuance to conduct discovery on the freedom of association claim.

(*See* Afanador Cert., Ex. I – April 7, 2009 Transcript at pp. 5-7.)

30. Judge Sheridan denied those motions. (*See id.*)

31. Judge Sheridan permitted Plaintiff to amend his Complaint on the day of trial to include a freedom of association claim. (*See id.*)

32. The case then proceeded to trial over the following two-week period, during which the jury considered whether Plaintiff's First Amendment right to freedom of association was violated.

33. The jury returned a verdict on April 17, 2009.

34. Following the jury verdict, by way of Order dated October 1, 2009, Judge Sheridan ordered that a new trial should be conducted due to a potential conflict of interest. (*See* Afanador Cert., Ex. J – Oct. 1, 2009 Memorandum.)

35. As noted by Judge Sheridan, it was brought to His Honor's attention, following the trial in this matter, that while he was still a named member of the firm Graham Curtain Sheridan, his firm recovered counsel fees and costs as the prevailing party in a case against the City of Paterson. (*See id.*)

36. Therefore, Judge Sheridan, in order to "avoid the appearance of impropriety," set aside the jury verdict and requested that the matter be reassigned for a new trial. (*See id.*)

37 The Honorable Garrett E. Brown, Jr., U.S.D.J. re-assigned the matter to the Honorable Dennis M. Cavanaugh, U.S.D.J. (*See* Afanador Cert., Ex. K – Oct. 7, 2009 Order.)

38. Shortly thereafter, the Honorable Mark Falk, U.S.M.J. held conferences to discuss the case.

39. During the discussions with Judge Falk and in the submissions sent to the District Court, Plaintiff agreed that Judge Cavanaugh's involvement should begin at the time that Judge Sheridan became involved and that *in limine* and summary judgment motions needed to be decided by Judge Cavanaugh.

40. As such, Judge Cavanaugh directed that the motions previously filed before Judge Sheridan should be re-filed for decision by His Honor. (*See* Afanador Cert., Ex. L – May 12, 2010 Letter.)

41. The parties simultaneously re-filed their respective summary judgment motions.

42. By way of Order dated May 23, 2011, Judge Cavanaugh granted Defendants' summary judgment motion and denied Plaintiff's motion *in limine* as moot. (*See* Afanador Cert., Ex. L – May 23, 2011 Order at p. 1.)

43. Judge Cavanaugh noted that [a]n essential factor for an actionable [freedom of speech] claim is that the plaintiff must have engaged in constitutionally protected speech." (*See* Afanador Cert., Ex. L – May 23, 2011 Opinion at p. 4.)

44. Therefore, the District Court dismissed Plaintiff's single claim – a freedom of speech claim – since Plaintiff "never engaged in any political speech, if any speech at all[,]"even if Chief Wittig erroneously believed otherwise. (*See id.* at pp. 4-5.)

45. Plaintiff appealed Judge Cavanaugh's Order to the United States Court of Appeals for the Third Circuit.

46. The Third Circuit heard oral argument on June 28, 2012.

47 In an Opinion by the Honorable D. Brooks Smith, Circuit Judge, the Third Circuit, after noting that "[t]his case [has] a complicated and highly unusual history in the District Court," reversed Judge Cavanaugh's grant of Defendants' summary judgment motion and remanded the matter. (*See* Afanador Cert., Exs. N and O – July 16, 2012 Order and Opinion, respectively.)

48. Specifically, the Third Circuit "instructed [the District Court] to permit the parties to re-file their summary judgment motions with updated statements of undisputed material fact and to allow full opposition and reply briefing." (*See* Afanador Cert., Ex. O – July 16, 2012 Opinion at pp. 8-9.)

49. The Third Circuit emphasized the need for each "party [to have] a full opportunity to respond" by "offering all relevant, reliable evidence," (*Id.* at p. 7.)

50. Based upon Plaintiff's reliance on testimony from the trial before Judge Sheridan in his appellate

arguments, the Third Circuit noted that the trial testimony is "highly relevant" and, for that reason, should be considered by Judge Cavanaugh on remand. (*See id.* at pp. 7-8.)

51. However, Plaintiff failed to apprise the Third Circuit that the trial transcript is incomplete and unreliable and, hence, cannot be relied upon by the District Court.

52. With respect to Plaintiff's freedom of speech claim, the Third Circuit stated that "[w]e do not reach the question of the viability of Heffernan's Free Speech claim. The District Court should re-examine that claim in light of the full record and the parties' supplemental briefing." (*Id.* at p. 10.)

53. With respect to a possible freedom of association claim, the Third Circuit noted that "Judge Cavanaugh's opinion made no mention of Heffernan's Free Association claim" and "that the able District Judge erred by failing to address Heffernan's Free Association claim." (*Id.* at pp. 5, 9.)

54. Specifically, the Third Circuit directed:

> We hold solely that it was error for the District Court to enter judgment in favor of Defendants after discussing only Heffernan's Free Speech claim, considering that Heffernan had previously obtained a jury verdict on his Free Association claim. On remand, the District Court should consider the extent to which Heffernan prosecuted his Free Association claim and whether Defendants

> timely objected to trial of the Free Association claim. The District Court should also consider the appropriate remedy, whether it be dismissal of the Free Association claim, reopening discovery solely on Free Association, or proceeding to trial.

(*Id.* at p. 10.)

55. Following the Third Circuit's reversal and remand, this Court set down a dispositive motion briefing schedule, pursuant to which Defendants respectfully submit this joint application for summary judgment as to all claims asserted, and to be asserted, by Plaintiff.

B. Factual background

56. As stated *supra*, Plaintiff alleges in the Complaint that Defendants "intentionally, wilfully [sic], and recklessly transferred Plaintiff in order to deny Plaintiff his First Amendment **right to free speech**." (*See* Afanador Cert., Ex. A – Complaint at ¶41.)

57 Specifically, Plaintiff alleges that he was transferred to the Traffic Division in retaliation for putting up signs supporting Lawrence Spagnola, who was running for Mayor of the City of Paterson in 2006 against incumbent Defendant Mayor Jose Torres. (*See id.* at ¶¶14-15, 25, 27.)

58. Plaintiff also alleges that his mother, a resident of Paterson and supporter of Spagnola,

requested that Plaintiff assist her in acquiring a larger sign for her lawn. (*See id.* at ¶¶14, 17, 19.)

59. On April 13, 2006, Plaintiff and his son were parked in his car waiting for City Councilman Aslon Goow to give him this sign. (*See id.* at ¶21.)

60. At no point in Plaintiff's Complaint does he allege that he was hanging signs, either with Councilman Goow or for his mother, in support of Spagnola's candidacy.

61. To the contrary, Plaintiff has repeatedly claimed that he was *not* hanging signs and did not engage in any political activity whatsoever during the 2006 campaign. (*See* Afanador Cert., Ex. P – Plaintiff's Dep. at 61:17-63:6.)

62. Plaintiff took *no* position in the election and was ineligible to vote since he was not a resident of the City of Paterson. (*See* Afanador Cert., Ex. A – Complaint at ¶16.)

63. Plaintiff testified during his deposition that (1) "[he] wasn't working on the campaign, period"; (2) "[he] got [his] signs, and [he] went to [his] mother's house, dropped it off [and] didn't even put it up"; and (3) "[he] wasn't going to post [the sign] [and] didn't have tools" to even put it up. (*See* Afanador Cert., Ex. P Plaintiff's Dep. at 61:6-7, 62:22-25, 133:12-17.)

64. Even during Plaintiff's psychological evaluation with Steven S. Simring, MD, MPH, Plaintiff disclosed that "he picked up a Spagnola lawn sign

only because his mother asked him to do so," that "he had taken no position in the election," that he was "falsely" linked to Spagnola's campaign, and that Defendants' "perceived disloyalty" was unfounded. (*See* Afanador Cert., Ex. Q – Dr. Simring Report at p. 2.)

65. Defendants never contested the "perceived disloyalty" that stemmed from the mistaken belief that Plaintiff had posted signs and was politically involved with Spagnola. In fact, Defendant Police Chief James Wittig testified that he had an office policy prohibiting those who worked in his office from political campaigning. (*See* Afanador Cert., Ex. R – Wittig Dep. at 73, 82-83.)

66. Chief Wittig's policy was implemented to promote a neutral position to the public within Chief Wittig's office. (*See id.*)

67 Chief Wittig is vested with the responsibility to make all assignments in the Police Department. (*See id.* at 7-10, 39:11-17.)

68. Chief Wittig admittedly transferred Plaintiff because he believed that Plaintiff was "overtly [involved] in a political election" and had disregarded the office policy. (*See id.* at 73, 82-83.)

69. By his own admission, Plaintiff did nothing more than pick up a sign for his mother. (*See* Afanador Cert., Ex. P – Plaintiff's Dep. at 62:22-25.)

Dated: March 8, 2013

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEFFREY HEFFERNAN **Plaintiffs,** **v.** **CITY OF PATERSON, et al.** **Defendants.**	:	**DOCKET NUMBER:** **Civil Action No. 06-3882 (DMC)(JAD)**

PLAINTIFF'S STATEMENT OF FACTS PURSUANT TO LOCAL RULE 56.1

(Filed Apr. 5, 2013)

I. PROCEDURAL HISTORY

1. On August 17, 2006, Plaintiff filed the Complaint in the instant action (Exhibit E, at A-11-A-19).

2. Plaintiff's Complaint contained two (2) counts, 1) "First Amendment Violations", and 2) "Violation of the Contentious Employee Protection Act." (Id)[1] In Paragraph 42 of the Complaint, located in Count I "First Amendment Violations", Plaintiff alleges that "Defendants' actions were to penalize and retaliate against Plaintiff for his exercise of fundamental First Amendment rights." (Id, at A-17).

[1] Plaintiff ultimately dismissed the CEPA claims prior to trial.

3. On January 26, 2009, Plaintiff filed a Motion in Limine "For this Court to Find as a Matter of Law that the Plaintiff Engaged in Protected Speech." In this Motion, Plaintiff not only argued that his conduct constituted protected *speech*, but he also argued that it also was protected by his First Amendment Freedom of Association. Exh. "LL"

4. Also on January 26, 2009, Defendants filed a Motion for Summary Judgment, arguing that Plaintiff did not engage in protected speech. Defendants did not raise Plaintiff's freedom of association claim in their brief.

5. Judge Sheridan did not permit response briefs to be filed by either party with regard to Plaintiff's motion in Limine or Defendants' Motion for Summary Judgment.

6. On February 9, 2009, both Plaintiff and Defendants filed their respective trial briefs. In Plaintiffs' trial brief, he again raised the issue of Plaintiff's Freedom of Association rights (Exh. "MM", A-119-A-132).

7 On February 24, 2009, a pre-trial Order was entered, stating, *inter alia*, the following legal issues for Plaintiff: "1) Whether Plaintiff was demoted and transferred in direct retaliation for his First Amendment rights; 4) Whether Plaintiff was demoted in direct retaliation for his exercise of protected activities; 5) Whether Plaintiff was denied promotion in direct retaliation for his exercise of protected activities; 6) Whether Plaintiff's assignments to walking

and to cell block were assignments of punishment in retaliation for his exercise of protected activities; Whether Plaintiffs continued removal of his weapons was retaliation for his exercise of protected activities 8) Whether the removal of Plaintiff's private weapons was in direct retaliation for his exercise of protected activities." (Exh. "KK", A-62).

8. Further, Defendants' legal issues included, *inter alia*, the following: "1) Whether Plaintiff was engaged in political activity that would afford Plaintiff protection pursuant to the First and Fourteenth Amendments; 3) Whether Plaintiff's actions are protected under the First Amendment." Id. at A-62-A-63.

9. On April 3, 2009, Judge Sheridan denied Defendants' Motion for Summary Judgment (Exh. G, A-142-A-143).

10. On the record, Judge Sheridan stated that Plaintiff had a cognizable First Amendment Freedom of Association claim (Exh. F, A-133-A-141).

11. In doing so, the Court relied on statements that it was Plaintiff's "political affiliations" and "overt[ ] involvement in the political election" was the cause of the retaliation Plaintiff faced (Id. at A-135, 1.9-10).

12. Further, Judge Sheridan stated that "there is little doubt that the Plaintiff was seen holding a sign of Spagnola's who was running for mayor and he was with this other councilperson, Mr. Goow, who was a party or political affiliate with Spagnola." (Id., A-136,

1.69). As such, the Judge denied Defendants' Motion for Summary Judgment and allowed Plaintiff to proceed on an *association* claim against Defendants.

13. As such, this case proceeded to trial before the Honorable Peter Sheridan on the issue of, *inter alia*, whether Plaintiff's First Amendment rights of freedom of association were violated. Moreover, the verdict slip chosen by Judge Sheridan specifically asked whether Plaintiff's Freedom of Association rights were violated by Mayor Torres, Chief Wittig, and the custom, practice, policy statement, or policy decision by the City of Paterson (Exh. H, A-144-A-146).

14. With regard to the scope of Plaintiff's claims, Judge Sheridan was clear that said claims involved both speech and association. "The final pretrial order set up the issue with regard to association and speech," and that "both the parties knew the scope of the issue." (Exh. BB, A-271, 1.16-18).

15. Moreover, when Judge Sheridan denied Defendants' Motion for Summary Judgment on April 3, 2009, (Exh. "G", A-142-A-143), Judge Sheridan based this ruling in part on the breadth of the pre-trial Order, and therefore stated on the record that Plaintiff had set out a cognizable First Amendment Freedom of Association claim (Exh. "F", A-133-A-141).

16. Further, Judge Sheridan stated that "there is little doubt that the Plaintiff was seen holding a sign of Spagnola's who was running for mayor and he was with this other councilperson, Mr. Goow, who was a

party or political affiliate with Spagnola." (Id., at A-136).

17. Moreover, at the outset of the first full day of trial, Judge Sheridan rejected Defendants' counsel's argument that the association claim was a "surprise" In doing so, Judge Sheridan ruled that Plaintiff's pleadings were sufficient as to the association claim and that the scope of the terms of the pre-trial order included an association claim. Specifically, Judge Sheridan stated the following:

> ***I had the issue from Mr. Afanador with regard to the surprise as this being an association case as opposed to a speech case.*** I do note one interesting issue and I didn't know – but there was a case last year Judge Simandle. Had by a police officer against a police chief. In that case, although it was an association case, the chief was demoted or did something to this officer because of his relationship with the union. But at any rate, the judge charged it's as an affiliation case but throughout his opinion he talked about the speech parts of it so it was kind of a combination of both of them. I just want to let you know that. But at any rate, my view – and I read the Shultz versus Calli case and the Warner versus – 267 F.3d 288. The Warner case the problem was that there were insufficient facts disclosed prior to trial in a security transaction. ***We don't have that here. Discovery was entirely complete. All parties had all the facts that were necessary for them to proceed.*** So, I

don't see that the case is like the Warner case. With regard to the Shultz v. Calli, that's an interesting case because it goes into a lot of different things and one of them was, the plaintiff pled jurisdiction incorrectly and somehow it came up during the trial I guess and then at the end of it, it became a huge issue if there was a federal case involved. At any rate, it was sent back down to the District Court to comply with its turn-around. ***But the truth of the matter was that there was insufficient pleadings and there was a hole in the case as to a number of facts and the pleading of them. In this case, we don't have that either. We have a case where discovery was substantial. A number of people were deposed. There was a final pretrial order. The final pretrial order set up the issue with regard to association and speech.*** I got two motions on that summary judgment from the defendant and a motion in limine, I think, it was from the plaintiff asking me to declare that there was a violation of the First Amendment and he put it in different terms, one on association and one on free speech. ***But both the parties knew the scope of the issue. Everybody had time to plead their cases and to put their defenses and the plaintiff putting forth his case with more than reasonable time.*** So, I don't see from the cases cited would be controlling in this case and ***I'm going to allow the case go forward as it is.***

Exh. "BB", A-270:10-A-272:3.

18. As such, this case proceeded to trial before the [sic] Judge Sheridan on the issue of, *inter alia*, whether Plaintiff's First Amendment rights of freedom of association were violated.

19. Moreover, the verdict slip chosen by Judge Sheridan specifically asked whether Plaintiff's Freedom of Association rights were violated by 1) Mayor Torres, 2) Chief Wittig, and 3) the custom, practice, policy statement, or policy decision by the City of Paterson (A-144-A-146).

20. With regard to the scope of Plaintiff's claims, Judge Sheridan was clear that said claims involved both speech and association. "The final pretrial order set up the issue with regard to association and speech," and that "both the parties knew the scope of the issue." (A-271).

21. On April 17, 2009, judgment was entered in favor of Plaintiff with regard to Defendants Wittig and Torres in the sum of $105,000 ($75,000 in compensatory damages, $30,000 in punitive damages), but entered against Plaintiff with regard to the City of Paterson (Exhibit R, A-180, doc. 80).

22. While post-trial motions and Defendants' appeal to the Third Circuit were pending, Judge Sheridan recused himself on October 1, 2009 (Exhibit J, A-148)[2] and Ordered a new trial (Exhibit I, A-147).

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[2] Judge Sheridan's recusal was based on the fact that, while post-trial motions were pending, Judge Sheridan brought to the

(Continued on following page)

23. The case was then assigned to Judge Cavanaugh (Exh. K, A-149).

24. On April 19, 2010, Defendants' counsel wrote to the Court and requested that Judge Cavanaugh render a decision on all issues addressed by Judge Sheridan prior to trial (Exhibit M, A-152-A-155). In said letter, Defendants' counsel states that Judge Sheridan did not permit opposition or response briefs to Defendants' Motion for Summary Judgment or Plaintiff's Motion in Limine to find that Plaintiff engaged in Protected Speech. Id.

25. In response, Judge Cavanaugh initially ruled that Judge Sheridan's rulings with regard to the aforesaid motions be adopted and set a trial date for September 14, 2010. Exhibit Q, A-166.

26. On April 28, 2010, Defendants' counsel wrote to the Court and again stated that parties had *not* been provided with an opportunity to file response briefs with regard to Defendants' Motion for Summary Judgment and Plaintiff's Motion in Limine. As such, Defendants' counsel requested oral argument "to address any questions which Your Honor may have concerning the motions and provide counsel an opportunity to be heard." (Exhibit O, A-161-A-163).

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attention of counsel that His Honor's former firm, a number of years earlier while Judge Sheridan was on the bench, settled a civil rights case with the City of Paterson.

27 On May 7, 2010, Plaintiff's counsel requested that additional briefs be filed with regard to the aforesaid motions (Exhibit P, A-164-A-165). Plaintiff stated that a reason for this belief was that parties now not only had the record from discovery, but also had testimony from trial. Id. Plaintiff also requested that the pre-trial Order be amended for the same reason. Id.

28. However, on May 12, 2010, the Court Ordered that the aforesaid motions be entertained by the Court, but that no additional briefs would be filed, nor would any additional evidence be presented. Exh. "Q" Further, Judge Cavanaugh also ruled that the Pre-Trial Order not be amended. Id.

29. From September 21-24 2010, the motions for summary judgment and *in limine* were re-filed, per the Judge's Order (Exh. R, A-187-A-189).

30. On May 23, 2011, Judge Cavanaugh granted Defendants' motion for summary judgment (Exh. C, A-4; Exh. D, A5-A10). However, the issue of Plaintiff's Freedom of Association claim was not addressed in His Honor's Opinion. Id.

31. In His Honor's Opinion, Judge Cavanaugh ruled that Plaintiff had not engaged in protected speech, or even speech at all. Id. Accordingly, the Court granted summary judgment and dismissed all claims. Id.

32. Plaintiff filed a notice of appeal on June 17, 2011 (Exhibit "A").

33. The Third Circuit granted this appeal on July 16, 2012. Exh. "JJ"

34. The Third Circuit stated that, related to the speech claim, the trial Court erred in not permitting response/supplemental briefs for the motions for summary judgment, and that the Court also erred in not permitting parties to supplement the record by using testimony adduced at trial. Exh. "JJ", p. 9-10.

35. The Third Circuit then remanded this suit back to the District Court, with the instruction that the Court was to permit new briefing on the motions for summary judgment as to speech as well as to allow parties to file response briefs and cite to the full record in existence at the time of the new briefing. Id.

36. At oral argument, the Third Circuit in oral argument stated that the Defendants had clear notice of Plaintiff's Association claim. Specifically, Judge Rakoff stated the following in response to opposing counsel's argument at oral argument that the pre-trial Order did not include an Association claim:

> JUDGE RAKOFF· "And the pretrial order, points 4 and 5 said, point 4 says, well, the plaintiff was demoted in direct retaliation for his exercise of protected activities. 5 says, well, the plaintiff was denied promotion in direct retaliation for the exercise of protected activities. Now, protected activities means protected activities under the First Amendment. And under the First Amendment, there are a myriad of activities protected.

> One is speech, one is association." Exh. "NN", 18:20-19:3.

Judge Rakoff went further, stating:

> JUDGE RAKOFF· "[Plaintiff's] claim was a First Amendment retaliation claim. That's what the Complaint talked about. In the pre-trial [sic] order not only talks about speech, but it talks about protected activities." Id., at 1.9:17-21.

Moreover, the panel specifically stated that Defendants were on notice of the association claim. As Judge Rakoff stated:

> JUDGE RAKOFF: "So all that was wiped out was the determination of the jury. The fact that you were now on notice, ***unbelievably clear notice, of a Freedom of Association claim*** wasn't wiped out." Id., at 20:9-12. (emphasis added).

Judge Rakoff similarly stated:

> JUDGE RAKOFF: "[N]ow you are on notice because you've had a whole trial of what the claim is." Id., at 18:8-11.

Judge Fisher agreed with Judge Rakoff that Defendants were in fact on notice of the Freedom of Association claim, stating the following:

> JUDGE FISHER: "How could you say you were not placed on notice? You have a Freedom of Association claim that was discussed with Judge Sheridan, it was instructed to the jury that the jury follow. How could you say

> you were not on notice? ***You can't say you weren't on notice. Your other arguments I invite, but you certainly can't sat*** [sic] ***you weren't on notice.***" Exh. "NN", at 22:6-21 (emphasis added).

In fact, when opposing counsel attempted to argue that the instant action was merely a "speech case", Judge fisher interrupted him, stating "It's a retaliation case." Id. 22:22-24.

37 On February 11, 2013 the District Court entered a briefing schedule as to parties' Motions for Summary Judgment. In accordance with said schedule, Plaintiff filed on March 8, 2013 a Motion for Summary Judgment as to Whether Plaintiff Engaged in Protected Speech. Said motion is pending.

38. Also in accordance with the Court's briefing schedule, Defendants filed motions for summary judgment against Plaintiff on March 8, 2013.

II. STATEMENT OF FACTS

39. At all times material, Plaintiff was a police officer with the Paterson Police Department since November 1985 (Exh. CC, A-479, 1.17-19).

40. Plaintiff was initially assigned to Patrol and then to the Communications Division. Id., A-480, 1.5-12.

41. In December 2005, Plaintiff became a Detective assigned to Chief Wittig's office. (Id., at A-480, 1.13-A-481, 1.9).

42. On April 13, 2006, while off duty, Plaintiff drove into Paterson to collect a campaign yard sign for the campaign of Lawrence Spagnola (A-194, 59:9-60:24), the former Chief of Police in Paterson, who was a candidate in the May 2006 mayoral election (A193a, 54:18-55:7).

43. Plaintiff, who is a close personal friend of Spagnola, spoke to Spagnola two or three times per week via phone (Exh. S, A-193a, 56:11-23) and has known him since 1985 (Id).

44. In fact, Chief Wittig, Lieutenant Papagni, and Deputy Chief Fraher of the Paterson Police Department were fully aware that Plaintiff was friends with Spagnola and thought that Plaintiff was "craz[y]" for being Spagnola's friend (Exhibit S, A-196, 67:2-10).

45. Plaintiff was obtaining the campaign sign for his mother, a Spagnola supporter who desired a bigger lawn sign (Exhibit S, A-194, 59:9-14).

46. Plaintiff first called Jimmy Durkin, a Paterson Police Officer who was also the individual who constructed the Spagnola lawn signs (Id., at 59:15-60:23).

47 Durkin instructed Plaintiff to contact Paterson City Councilman Aslon Goow (Id), who was also Spagnola's mayoral campaign manager (Exh. T, A-205, 1.17-18), at the corner of Maitland and Union Avenues in Paterson, NJ, where Goow was gathering with Spagnola supporters to provide them with Spagnola lawn signs. Exhibit S, A-194, 59:15-60:23.

48. Plaintiff then drove to said gathering of Spagnola supporters (Id), spoke to Goow, the Spagnola campaign manager and picked up a Spagnola lawn sign to deliver to his mother, a Spagnola supporter (Exh. S, A-194, 59:15-60:23).

49. When picking up the sign from Councilman Goow (Exh. BB, A-373, 1.2-A-378 1.19), which occurred at appropriately [sic] 2:00-2:10pm (Exh. BB, A-403, 1.4-8; A-411, 1.16-23), Paterson Police Officer Arsenio Sanchez was patrolling in the vicinity when he saw Goow standing in a private front yard, and Jeffrey Heffernan sitting in a nearby car. (Exh. BB, A-283, 1.2-A-284, 1.6).

50. Sanchez worked in Mayor Torres' office as a security officer. Exh. "BB", A-276, 1.4-10.

51. Additionally, Sanchez worked for the Torres Mayoral re-election campaign. Exh. "BB", A-377, 1.5-A-378, 1.2.

52. Upon seeing Sanchez at the campaign gathering, Goow told Plaintiff that officers in the Chief's office hated Goow and that Sanchez was probably on the phone with the Mayor or Chief discussing Plaintiff's presence at the campaign sign gathering (Exh. S, A-195, 62:13-18).

53. Goow's prediction was accurate. As soon as Sanchez saw Plaintiff with a campaign sign, he immediately spoke with Chief Wittig over the phone, setting into motion a swift chain of communication pertaining directly to Plaintiff's political activity of

picking up a Spagnola campaign sign, leading to the retaliation against and transfer of Plaintiff. This phone call is corroborated by cell phone records indicating that Sanchez spoke with Wittig over the phone shortly after seeing Plaintiff (Exh. HH, A-842-A-846).

54. In fact, at trial, Sanchez admitted that a phone call was made between he and Chief Wittig at 2:14pm on the afternoon of the incident (Exhibit BB, A-285, 1.18-A-293, 1.9), and Goow testified that Plaintiff had been at the campaign gathering at around 2:00-2:10pm. (Exh. BB, A-403, 1.4-8; A-411, 1.16-23).

55. As a result of Sanchez's phone call with Wittig only a few minutes after the Heffernan incident, several Paterson Police officers and even the Mayor learned about Heffernan's conduct that very same day.

56. Detective Greco, who worked in the Chief's office (Exh. AA, A-251, 1.8-22) with Plaintiff and Lt. Papagni (Exh. AA, A-252, 1.21-A-253, 1.8), testified that he overheard a conversation between Mayor Torres and Lt. Papagni on the day of the incident wherein it was discussed that Arsenio Sanchez witnessed Plaintiff Heffernan taking a campaign sign (Exhibit AA, A-252, 1.19-A-258, 1.2).

57 Detective Sergeant Greco testified that he had overheard Lt. Papagni on the phone that day angrily saying "he did what?" in a boisterous fashion. Id., at A-254-A-256.

58. Lt. Papagni later told Greco that he had received said phone call from the Mayor regarding Plaintiff, and that Plaintiff had been seen with a campaign sign. Id., at A-256-A-257

59. In fact, Greco testified that Mayor Torres informed Papagni that he (Mayor Torres) was very upset and wanted Plaintiff disciplined and transferred. A-257, 1.18-22.

60. Within a day, Plaintiff was transferred. Id., at A-257-A-258.

61. Further, Papagni admitted at trial that he spoke to the Mayor every day of the year (Exhibit DD, A-777, 1.24-A-778, 1.24; Exh. "V", A-212), which supports Detective Greco's testimony set forth above that Papagni subsequently informed Mayor Torres of Plaintiff's conduct (Exh. AA, A-252, 1.21-A-253, 1.8).

62. While Plaintiff did not personally nail the sign into the yard, he picked up the sign with the express intention to deliver it to his mother, a Spagnola supporter, so that it would in fact be placed in the yard. Moreover, Plaintiff stated that his failure to post the sign in his mother's yard was not a matter of not wanting to engage in political activity; rather, it was simply "because [he] didn't have the tools with [him]." (Exh. S, A-195, 62:23-63:2).

63. Due to the hotly contested nature of this election within the Police Department, Goow stated that he believed that Heffernan's "helping" with the campaign would lead to him being "targeted" in the

Department given the "political climate" that existed (Exh. T, A-203, 1.2-8).

64. In fact, it was clear that there would be "political ramifications" for supporting one candidate over another (Exh. T, A-203, 1.17-18, A-205a, 1.12-15).

65. Goow even told Plaintiff to leave the area just prior to being seen by Sanchez because if Plaintiff was seen with Goow at the campaign site then they were "going to have problems" (Exhibit T, A-204, 1.1-4), and Heffernan was aware of the animosity between Goow and Wittig (Exh. S, A-195, 62:15-18).

66. Goow also noted that Plaintiff would be punished for his "role in the Spagnola campaign" (Exh. "T", 207a, 1.12-13).

67 Deposition and trial testimony indicate that Heffernan did in fact support the Spagnola campaign. At trial, Aslon Goow indicated that Plaintiff had in fact participated in the Spagnola campaign (Exhibit BB, A-405, 1.16-18), and that Plaintiff was a "supporter" of Spagnola (Exhibit BB, A-405, 1.23).

68. At trial, Plaintiff explicitly testified that with regard to the Mayoral race, he "wanted [Spagnola] to win." (Exh. CC, A-486, 1.17-19).

69. Heffernan also testified at trial that the specific manner in which he picked up the sign – by meeting Goow at a gathering of campaign supporters at a remote location and bringing it to his mother's house (Exhibit CC, A-491, 1.16-A-493, 1.22) – was done specifically because it would "help them out,"

referring to the Spagnola campaign (Exhibit CC, A-488, 1.1-9).

70. Plaintiff also stated at trial that he was "associated" with the Spagnola campaign. Exhibit CC, A-637, 1.13-15.

71. Plaintiff at deposition specifically stated that he was "politically affiliated" (Exh. S, A-201, 153:3-5), specifically referring to the campaign sign incident, and that it was this political affiliation that caused him to be retaliated against. Id. See also, Exh. "S", A-193a, 54:1-12.

72. Heffernan was aware that the Mayoral race was an "ugly campaign" (Exhibit S, A-197, 83:3), yet he took the aforementioned actions despite the possibility of retaliation.

73. Moreover, additional officers quickly learned of the Heffernan incident, which was then passed on to Mayor Torres. Lt. Papagni admitted at trial that he learned about the Heffernan incident from Detective John Maes Exh. DD, A-783, 1.11-23, and his cell phone records corroborate this (Exhibit FF, A832-A839; See also, Exh. DD, A783, 1.24-789, 1.6).

74. From Papagni's conversation with Maes, Papagni was informed that Plaintiff was picking up a campaign sign, which Papagni considered "political activity." Exh. DD, A-783, 1.12-13.

75. In fact, later in the afternoon on the day of the incident, Plaintiff called Detective John Maes, who also worked in Chief Wittig's office. Maes and

Plaintiff are friends; Plaintiff called to confirm their lunch plans for the following day. Exh. S, A-195, 64:1-65:18.

76. During that conversation, Maes informed Plaintiff that he heard Plaintiff was putting signs up for candidate Spagnola (Exh. CC, A-494, 1.1-A-496, 1.23) and that as a result, "all hell is breaking loose" at the Chief's office. Exh. CC, A-496, 1.19-20.

77 The following day, April 14, 2006, Lieutenant Papagni, the executive officer for the Chief, called Heffernan to tell him that effective the following Sunday he would be transferred out of the Chief's office. Exh. DD, A-797, 1.18-A-799, 1.3.

78. Further, Chief Fraher stated that he was disappointed that Heffernan got "involved" (Exhibit Z, A-230, 15:22).

79. That day, April 14, 2006, Plaintiff went to the Chief's Office to collect his personal belongings. While there, Lieutenant Patrick Papagni and Deputy Chief William Fraher advised Plaintiff that he was not being transferred because of his job performance, rather, he was being transferred because of his political affiliation to Spagnola. Exh. "S", A-193a, 54:1-12.

80. Plaintiff thereafter was assigned to a walking post (Exhibit DD, A-657, 1.11-A-660, 1.25), which is used as punishment. Exhibit DD, A-681, 1.4-A-682, 1.7

81. Chief Wittig stated that on April 14, 2006, he transferred the Plaintiff to Traffic (Id), where

Plaintiff's duty was to patrol the streets while walking because of his "overtly involvement in a political election." Exhibit W, A-218, 1.4-10.

82. Chief Wittig testified that Traffic was sometimes used as a punishment post. Exhibit DD, A-681, 1.4-A-682, 1.7

83. Sergeant Greco also stated that a walking assignment was used as a punishment post, and that Lt. Papagni informed him of this fact. Exh. "BB", A-324, 1.22-A-325, 1.9.

84. As such, as a result of Plaintiff's actions and his "affiliation with Larry Spagnola", Plaintiff was retaliated against (Exhibit S, A-199, 132:9).

85. Chief Wittig testified that Plaintiff was picking up Spagnola signs which caused Plaintiff to be transferred (Exhibit DD, A-644, L.22-A-646, L.15).

86. Similarly, Deputy Chief Fraher told Raymond Heffernan that Plaintiff became "involved" by picking up a lawn sign (Exhibit BB, A-420, 1.3), and Defendant Mayor Torres testified at trial that obtaining political signs such as the one picked up by Plaintiff may be "political activity" (Exhibit DD, A-759, 1.4-7).

87 Detective Sergeant Greco, who worked in the Chief's office, testified at trial that Plaintiff was retaliated against directly for picking up a Spagnola sign (Exhibit AA, A-257, 1.1-22).

88. This was corroborated by the trial testimony of Plaintiff's brother, Raymond Heffernan, who was also

an officer in the Paterson Police Department, who stated that the retaliation against his brother occurred due to Plaintiff "obtaining a sign for [Plaintiff's] mother's lawn." (Exhibit BB, A-416, 1.24-25).

89. According to Raymond Heffernan, Plaintiff himself was aware that the retaliation occurred solely for him picking up the sign for his mother (Exhibit BB, A-417, 1.14-21).

90. As a result of Plaintiff's actions and his "affiliation with Larry Spagnola", Plaintiff was retaliated against (Exhibit S, A-199, 132:9).

DATED: April 5, 2013

MARK B. FROST & ASSOCIATES

/s/ Ryan Lockman
Ryan Lockman
Counsel for Plaintiff

Supreme Court, U.S.
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No. 14-1280

In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, MAYOR JOSE TORRES, and POLICE CHIEF JAMES WITTIG,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether the First Amendment bars the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate.

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BRIEF FOR PETITIONER

Petitioner Jeffrey J. Heffernan respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Third Circuit is published at 777 F.3d 147 (3d Cir. 2015) and appears at Pet. App. 1a. The opinion of the U.S. District Court for the District of New Jersey is published at 2 F. Supp. 3d 563 (D.N.J. 2014) and appears at Pet. App. 14a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Third Circuit was entered on January 22, 2015. The Court of Appeals denied a timely petition for rehearing en banc on February 13, 2015. Pet. App. 72a. The petition for certiorari was filed on April 22, 2015. This Court granted certiorari on October 1, 2015. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

It has been hornbook First Amendment law for decades that a public employer may not retaliate against nonpolitical employees for taking sides in an election. In this case, however, the Third Circuit allowed a mayor and a police chief to demote a police officer because they thought he supported the mayor's opponent in an upcoming election.

1. Petitioner Jeffrey Heffernan has been a police officer with the Paterson, New Jersey, Police Department since 1985. Pet. App. 2a. He began working as a patrol officer, and after receiving various commendations for his work, he was promoted to detective in 2005, and assigned to the office of respondent James Wittig, the Chief of Police. Pet. App. 2a.

Paterson held a mayoral election in 2006. One candidate was respondent Jose Torres, the incumbent mayor. Pet. App. 3a. Torres was supported by Chief Wittig—who had been appointed by Mayor Torres—and by Lieutenant Patrick Papagni, Wittig's Executive Officer. Lieutenant Papagni was Heffernan's direct supervisor and Chief Wittig was Heffernan's ultimate supervisor.

The other candidate was Lawrence Spagnola, a former Paterson police chief. Heffernan is a close personal friend of Spagnola's. Pet. App. 2a-3a. The two have known each other for decades. During the mayoral campaign, Heffernan spoke with Spagnola on the phone two or three times a week. JA 39-40. Heffernan wanted Spagnola to win the election, but he did not work on Spagnola's campaign, and he

could not vote for Spagnola because he did not live in Paterson. Pet. App. 3a, 17a. Heffernan's supervisors were well aware that he was friends with Spagnola. JA 114.

Shortly before the election, Heffernan's bedridden mother, a Spagnola supporter, asked Heffernan to drive into Paterson to obtain for her a large Spagnola campaign yard sign. Pet. App. 3a. She wanted the sign to replace a smaller sign that had been stolen from her yard. Pet. App. 3a. Early in the afternoon of April 13, 2006, while he was off duty, Heffernan drove to a distribution point where campaign workers were giving out signs. Pet. App. 3a, 16a. Assembled were Spagnola supporters and Spagnola's campaign manager, Paterson City Councilmember Aslon Goow. Pet. App. 16a. Heffernan spoke briefly with Goow and took a campaign sign, which he later delivered to his mother's house, so it could be posted in her yard. Pet. App. 3a.

Arsenio Sanchez, a Paterson police officer assigned to Mayor Torres's security staff, happened to be driving by on patrol while Heffernan was picking up the campaign sign at the Spagnola campaign gathering. Pet. App. 3a. Sanchez saw Heffernan speaking with Goow and holding the sign. Pet. App. 16a. Heffernan and Goow saw Sanchez watching them. Goow predicted that Heffernan's "helping" with the campaign would lead to him being "targeted" in the Police Department, and that there would "political ramifications" for supporting Spagnola. JA 49-50.

Goow's prediction was correct. Sanchez immediately called Police Chief Wittig. Pet. App. 16a. It was not long before Mayor Torres also knew of Sanchez's report. JA 117 Later that afternoon, when Heffernan spoke on the phone with Detective John Maes, a friend who worked in Wittig's office, Maes told Heffernan he had heard that Heffernan was putting up campaign signs for Spagnola, and that as a result, "all hell is breaking loose" in the Police Chief's office. JA 120.

The very next day, Heffernan was demoted from detective to patrol officer and assigned to a walking patrol post, as a punishment. Pet. App. 3a, 16a-17a. His supervisors told him he was being transferred because of his support for Spagnola. Pet. App. 17a. The Deputy Police Chief told Heffernan "that he was being demoted to walking patrol because of his political involvement with Spagnola." Pet. App. 17a. Wittig himself admitted that Heffernan was demoted because of his "overt[ ] involvement in a political election," Pet. App. 3a, and that that "political involvement ... was the cause of [Heffernan's] demotion." Pet. App. 17a.

Heffernan's supervisors never asked him why he was holding a Spagnola campaign sign. Heffernan first heard of their reaction when he spoke with Detective Maes on the phone, approximately two hours after being observed with the sign. He was formally informed of his demotion by Lieutenant Papagni the next day. All of this took place before Heffernan had an opportunity to speak with the department about his conduct or to explain his intent in picking up the lawn sign. Heffernan's supervisors simply assumed

he was campaigning for Spagnola, and they demoted him for that reason.

On August 17, 2006, Heffernan filed this § 1983 suit for retaliatory demotion in violation of his freedom of speech and of association. Pet. App. 3a. The District Court denied respondents' motion for summary judgment on the eve of trial and permitted Heffernan's freedom of association claim to proceed to a jury. Pet. App. 4a.

2. The jury found in Heffernan's favor. The jury awarded compensatory damages of $75,000—$37,500 each from Chief Wittig and Mayor Torres—and an additional $30,000 in punitive damages, half from Wittig and half from Torres. Pet. App. 4a, 18a. After trial, however, the District Judge retroactively recused himself based on what he believed to be a conflict of interest. Pet. App. 4a. The verdict was vacated and the case was reassigned to a different judge, who granted summary judgment for the respondents. Pet. App. 66a. That decision was reversed by the Third Circuit on procedural grounds, because the District Judge had improperly prohibited Heffernan from filing a brief in opposition to the motion for summary judgment. Pet. App. 57a. On remand, the case was reassigned to yet another District Judge. There was then a full round of briefing on the parties' cross-motions for summary judgment. Pet. App. 21a.

3. The District Court granted respondents' motion for summary judgment. Pet. App. 14a-54a.

The District Court held that Heffernan had no cause of action based on his *actual* speech or association, because he had not actually campaigned for Spagnola. Pet. App. 24a-33a, 43a-45a. The District Court also held that Heffernan could not state a cause of action based on his supervisors' incorrect perception of his *speech*, because Third Circuit precedent did not allow recovery on such a theory. Pet. App. 33a-35a.

The District Court also determined that Third Circuit precedent foreclosed a First Amendment retaliation claim based on a perceived-association theory—i.e., based on an employer's mistaken belief as to an employee's political association. Pet. App. 46a (citing *Ambrose v. Twp. of Robinson*, 303 F.3d 488 (3d Cir. 2002)). The District Court observed that the law was precisely the opposite in the Sixth Circuit, which "has clearly endorsed a perceived-support theory as a basis for a freedom-of-association retaliation claim." Pet. App. 47a (citing *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012)). The District Court noted that in *Dye* the Sixth Circuit had "explicitly disapproved the reasoning of the Third Circuit." Pet. App. 48a. The District Court acknowledged:

> There is a certain logic to *Dye*. Assume that State Employer A retaliates because Employee is a Democrat, or a Republican. Obviously there is a First Amendment freedom-of-association claim to be made. If State Employer B does the same thing, with the same unconstitutional retaliatory motive, *and is wrong to boot*, should it really be placed in a *more* fa-

> vorable position? Might the Third Circuit approach permit employers to intimidate employees into avoiding anything that might even be *mis* construed as political speech or affiliation? The *Dye* approach seems designed to afford the First Amendment some breathing space.

Pet. App. 51a-52a (footnote omitted).

4. The Court of Appeals for the Third Circuit affirmed. Pet. App. 1a-13a.

The Third Circuit concluded that Heffernan could not bring a First Amendment claim based on his actual speech. In the court's view, such a claim requires "an intent to convey a particularized message," Pet. App. 9a (citation and internal quotation marks omitted), but "no room exists for a jury to find that Heffernan intended to convey a political message when he picked up the sign at issue." Pet. App. 10a.

The Third Circuit next determined that Heffernan could not bring a First Amendment claim based on his actual political association. In the court's view, such a claim has three elements: "(1) that the employee works for a public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision." Pet. App. 10a (citation and internal quotation marks omitted). The Third Circuit noted that "[t]he first and third elements are plainly

established on the record before us." Pet. App. 10a. But the Third Circuit determined that Heffernan could not establish the second element, "affiliation with a political party," because Heffernan "did not have any affiliation with the campaign," Pet. App. 10.

The Third Circuit also rejected Heffernan's claim based on *perceived* speech and association. The Third Circuit held that a retaliatory demotion violates the First Amendment only where it is based on an employee's *actual* speech or political affiliation. Pet. App. 12a-13a. This was so, the court reasoned, because "a traditional element of a First Amendment retaliation claim" is "the requirement that the plaintiff in fact exercised a First Amendment right." Pet. App. 11a. The Third Circuit determined that Heffernan had not exercised such a right. As the court put it, "a First Amendment claim depends on First Amendment protected conduct, and there was none in this case." Pet. App. 13a (brackets and citation omitted). In the Third Circuit's view, the First Amendment protects only employees who were "retaliated against for taking a stand," not employees who were retaliated against "on a factually incorrect basis." Pet. App. 13a. The Third Circuit concluded that "it is not 'a violation of the Constitution for a government employer to [discipline] an employee based on substantively incorrect information.'" Pet. App. 13a (quoting *Waters v. Churchill*, 511 U.S. 661, 679 (1994).

The Third Circuit denied rehearing en banc. Pet. App. 72a.

SUMMARY OF ARGUMENT

It is well established that the First Amendment bars public employers from politically-motivated retaliation against nonpolitical employees such as police officers. Respondents retaliated against Heffernan because they thought he was campaigning for Spagnola. Respondents' factual mistake did not cure their constitutional mistake.

A. A First Amendment retaliation claim is predicated on the employer's perception of the employee's speech or association, and the employer's decision to fire or demote the employee because of that perception. *Waters v. Churchill*, 511 U.S. 661 (1994), and *Rankin v. McPherson*, 483 U.S. 378 (1987), both make clear that where a public employee is retaliated against due to a supervisor's misperception of what the employee said or did, it is the employer's perception that matters. In the cases involving politically-motivated retaliation against government employees, the Court has thus consistently focused on the employer's *perception* of the employee's political affiliation, and on the employer's decision to retaliate *motivated by that perception*, rather than on whether the employee was actually coerced to change his or her political affiliation. *See, e.g.*, *Branti v. Finkel*, 445 U.S. 507, 517 (1980).

The Court's focus on the employer's perception is consistent with other areas of First Amendment doctrine, in which the Court has likewise been careful to protect speech and association from being punished based on the misperception of government officials. The Court's focus on the employer's perception also

provides a simple rule for courts to administer, unlike the Third Circuit's view, which would require highly fact-intensive inquiries into the intent of employees and the accuracy with which employers perceived that intent.

The Third Circuit believed that because Heffernan had not actually engaged in any political association, his employers could not have infringed any First Amendment right. But it is the government's perception of Heffernan's actions, and the government's motive for retaliating against Heffernan—not Heffernan's intent in performing those actions—that triggers First Amendment protection. Indeed, the successful plaintiffs in the Court's prior cases were no more politically active than Heffernan. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 66-67 (1990); *Branti*, 445 U.S. at 508; *Elrod v. Burns*, 427 U.S. 347, 351 (1976). Political patronage is an unconstitutional motive for retaliating against a nonpolitical employee, whether or not the employee is politically active.

B. The Third Circuit's contrary view would yield absurd results. For example, the Third Circuit's view would allow a newly elected mayor to fire *all* municipal employees, on the factually incorrect ground that by serving under the previous mayor they had shown that they were politically disloyal. The Third Circuit's view would allow the government to retaliate against employees for their speech on matters of public concern, so long as their supervisors misunderstood what the employees said. The Third Circuit's view would allow the government to fire employees based on a supervisor's misperception of the

employees' race or religion. The sheer absurdity of these outcomes suggests that the Third Circuit's view cannot be right.

The Third Circuit believed that its erroneous view was commanded by a single sentence in *Waters*, 511 U.S. at 679: "We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." But the Third Circuit took this sentence out of context. It appears in a paragraph about the Due Process Clause, not the First Amendment, and it simply states that an innocent mistake of fact does not amount to a due process violation. *Waters* certainly does not suggest that an employer who makes a factual mistake is thereby given a free pass to violate other parts of the Constitution.

C. The Third Circuit's view would chill an enormous amount of political association. If a police officer can constitutionally be demoted because his supervisor incorrectly believes that the officer supports a candidate for mayor, then any public employee could be demoted or even fired because her supervisor incorrectly believes that she is a Democrat or a Republican. Employees would have to worry about everything they say or do at the office, for fear of leaving the boss with the wrong impression.

As a practical matter, public employees such as police officers are often inundated with requests from local campaigns and political parties to make contributions, attend fundraisers, and assist campaigns. These requests often come from incumbent candidates, who wield considerable power over mu-

nicipal personnel decisions. If these employees cannot be reasonably confident that they will be protected from retaliation if their employer perceives an insufficient level of support, the First Amendment protections described in *Rutan*, *Branti*, and *Elrod* will be toothless.

The Third Circuit's view makes no practical sense. It rewards the careless, politically-motivated supervisor, who has license to make kneejerk disciplinary decisions without any factual investigation. Meanwhile, the careful supervisor, who takes the trouble to learn whether his perception of an employee's political affiliation is actually correct, has no such license. The First Amendment can hardly permit careless supervisors to punish employees where conscientious supervisors could not.

ARGUMENT

Respondents violated the First Amendment by demoting Heffernan because they perceived that he supported the mayor's opponent in the upcoming election.

The police chief demoted Jeffrey Heffernan because he mistakenly believed that Heffernan was "overtly involved" in Spagnola's campaign. Pet. App. 17a. But demotions "based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990). Nonpolitical employees such as police officers—employees holding positions for which political affiliation is not "an appropriate requirement for the ef-

fective performance of the public office involved," *Branti v. Finkel*, 445 U.S. 507, 518 (1980)—are free to support one candidate or another, or indeed neither, without fear of being disciplined. As the Court has made clear, "[t]he denial of a public benefit" such as employment "may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly." *Elrod v. Burns*, 427 U.S. 347, 361 (1976) (plurality opinion).

The Court has explained several times that "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." *Connick v. Myers*, 461 U.S. 138, 149 (1983). Political patronage is an unconstitutional basis for retaliating against nonpolitical public employees, because "government may not make public employment subject to the express condition of political beliefs." *O'Hare Truck Serv., Inc., v. City of Northlake*, 518 U.S. 712, 717 (1996). The government cannot punish a citizen for failing to adopt an official's preferred political affiliation, and "a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

Respondents thought Heffernan was campaigning for Spagnola. Demoting him on that ground violated the First Amendment. Had Heffernan obtained the lawn sign to show his support for Spagnola, he un-

questionably would have been protected by the First Amendment. Respondents' factual mistake did not cure their constitutional mistake.

A. A First Amendment retaliation claim is predicated on the perception and motivation of the employer.

A First Amendment retaliation claim is predicated on the employer's perception of the employee's speech or association, and the employer's decision to fire or demote the employee because of that perception. Precedent and common sense both indicate that a government employer who is wrong may not demote an employee for a reason that would be off-limits to an employer who is right.

Where a public employee is fired due to a supervisor's misperception of what the employee said or did, it is the supervisor's perception that matters. In *Waters v. Churchill*, 511 U.S. 661 (1994), for example, the supervisor thought the employee was "knocking the department" and saying "what a bad place [it was] to work." *Id.* at 665. The employee insisted she had said nothing of the kind, and had merely expressed an opinion about staffing policies. *Id.* at 666. The question in *Waters* was whether a court should apply the First Amendment standard "to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself?" *Id.* at 668. A plurality of four Justices held that the constitutionality of a retaliatory employment decision should be evaluated based on what the employer "really did believe," rather than on what the employee actually said. *Id.* at 679-80. Three Justices con-

curring in the judgment agreed that it is the employer's perception that matters; they disagreed only with the plurality's view as to the sort of investigation the employer must undertake. *Id.* at 686 (Scalia, J., concurring in the judgment).

Likewise, in *Rankin v. McPherson*, 483 U.S. 378 (1987), a clerk in the county constable's office was fired for saying, in response to the news of an attempted assassination of the President, "if they go for him again, I hope they get him." *Id.* at 381. The clerk later clarified that she "didn't mean anything by it." *Id.* at 382. But the constable fired her, because he "believed that she 'meant it.'" *Id.* at 390. The Court held that the First Amendment prohibited the constable from retaliating against the clerk for her statement, regardless of whether the constable correctly perceived that that the clerk was exercising her First Amendment right to favor the assassination of the President. The important thing was the constable's perception of the clerk's speech, not the clerk's intent in speaking. The Court explained: "We cannot believe that every employee in Constable Rankin's office ... is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency." *Id.* at 391.

In the cases involving politically-motivated retaliation against government employees, the Court has thus consistently focused on the employer's *perception* of the employee's political affiliation, and on the employer's decision to retaliate *motivated by that perception*, rather than on whether the employee

was actually coerced to change his or her political affiliation. In *Branti*, for example, the Court rejected the argument that "so long as an employee is not asked to change his political affiliation or to contribute to or work for the party's candidates, he may be dismissed with impunity." *Branti*, 445 U.S. at 516. The Court explained that "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Id.* at 517. The Court focused on the perception and motivation of the employer rather than on the conduct or intent of the employee, and concluded that "it was sufficient ... for respondents to prove that they were discharged 'solely *for the reason* that they were not affiliated with or sponsored by the Democratic Party.'" *Id.* (quoting *Elrod*, 427 U.S. at 350) (emphasis added).

In his concurring opinion in *Rutan*, Justice Stevens likewise focused on the lawfulness of the employer's motivation rather than on the employee's conduct or intent. "What is at issue in these cases," he observed, "is not whether an employee is actually coerced or merely influenced, but whether the *attempt* to obtain his or her support through 'party discipline' is legitimate." *Rutan*, 497 U.S. at 89 n.6 (Stevens, J., concurring) (emphasis added). *See also Hartman v. Moore*, 547 U.S. 250, 260 (2006) (describing retaliation for the exercise of First Amendment rights as an "unconstitutional motive"); *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (same).

As one commentator has observed,

> In cases involving executive action, the Court routinely speaks in terms of motive. For example, in addressing a First Amendment challenge brought by a discharged employee of the government, the Court will ask whether the government fired the employee because it disapproved of her expression. See, for example, *Connick v Myers*, 461 US 138, 143-46 (1983). The Court apparently sees the examination of motive in such cases as different in kind from—and less problematic than—the examination of the motives underlying legislation.

Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 427 n.43 (1996). As the Court said of Title VII, in the employment context the First Amendment "prohibits certain *motives*, regardless of the state of the actor's knowledge." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

These cases all point in the same direction: First Amendment retaliation claims are inherently based on the government employer's perception and how the employer responds to what he or she perceives. The essence of a retaliation claim is that the employer perceives something he or she does not like and takes adverse action because of it. The claim is premised on the perception and response of the employer, not the conduct or intent of the employee. This perspective is consistent with the purpose of the First Amendment, "to protect unpopular individuals from retaliation" by the government. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). As

Jeffrey Heffernan could attest, whether a person is unpopular with government officials is a matter of how those officials perceive him.

In other areas of First Amendment doctrine the Court has likewise been careful to protect speech and association from being punished based on the misperception of government officials. The Court has found loyalty oath requirements inconsistent with the First Amendment, in large part because of the danger that otherwise public employees would be punished because their employers mistakenly perceive them to favor the overthrow of the government. *Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589, 606-07 (1967). Restrictions on the expenses associated with charitable solicitation are inconsistent with the First Amendment, in large part because of the danger that otherwise government officials would misperceive high overhead costs as evidence of fraud. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 793-94 (1988). A ban on cross-burning is inconsistent with the First Amendment, because of the danger that otherwise government officials would misperceive a benign cross-burning as one done with the intent to intimidate. *Virginia v. Black*, 538 U.S. 343, 365-66 (2003) (plurality opinion).

The Court's consistent focus on the employer's perception provides a simple rule for courts to administer, unlike the Third Circuit's view, which would require highly fact-intensive inquiries into the intent of employees and the accuracy with which employers perceived that intent. On the Third Circuit's view, whether respondents could lawfully de-

mote Heffernan, for example, would turn on (1) Heffernan's intent at the moment Sanchez observed him holding the Spagnola campaign sign (i.e., whether he was holding the sign with the intent to advance the Spagnola campaign or with the intent to do a favor for his mother), and (2) whether Wittig and Torres correctly perceived Heffernan's intent. The Court's cases in this area avoid these difficult fact-finding and line-drawing exercises, in favor of a bright-line rule forbidding employers from retaliating for improper motives.

The irony in the Third Circuit's holding is that had Heffernan not testified about his intent, he would clearly have been protected by the First Amendment, since all the other evidence—including the beliefs of Chief Wittig, Officer Sanchez, and even Aslon Goow, Spagnola's campaign manager—overwhelmingly supported the proposition that Heffernan picked up the sign with the intent to campaign for Spagnola. The Third Circuit's view hardly encourages employees to describe their intentions honestly.

The Third Circuit believed that because Heffernan had not actually engaged in any political association, there was nothing for his supervisors to retaliate against, and thus that his supervisors could not have abridged his freedom of association by punishing him. Pet. App. 13a. This view misunderstands the nature of the right being protected. It is the government's perception of Heffernan's actions—not Heffernan's intent in performing those actions—that triggers the First Amendment's protection. Police Chief Wittig believed that Heffernan was putting up

campaign signs for Spagnola, and he retaliated against Heffernan on that basis. From the perspective of, and in the perception of, government officials, Heffernan was engaging in political association.

Indeed, the successful plaintiffs in the Court's prior cases were no more politically active than Heffernan. Cynthia Rutan, for example, was a rehabilitation counselor who was denied promotions because she had not worked for the Republican Party. *Rutan*, 497 U.S. at 66-67 Her co-plaintiff Franklin Taylor operated road equipment for the state transportation department; he was denied a promotion for the same reason. *Id.* at 67. Co-plaintiff James Moore could not get a job as a prison guard because he did not have the support of Republican Party officials. *Id.* None of these public employees conveyed messages of any kind, much less "particularized" messages, Pet. App. 9a, and none was affiliated with a political campaign. Yet the Court found that these hiring decisions violated the First Amendment, which bars the government "from wielding its power to interfere with its employees' freedom to believe and association, or to not believe and not associate." *Id.* at 76.

The plaintiffs in *Branti* were not politically active either. They were public defenders who were fired, not for anything they said or for working on campaigns, but "solely because they were Republicans." *Branti*, 445 U.S. at 508. The Court held that this was enough to violate the First Amendment. *Id.* at 519. Nor did the *Elrod* plaintiffs speak out on political matters or work on political campaigns. They were employees of the sheriff's office, including a bailiff and a process server, who were fired "solely

because they did not support and were not members of the Democratic Party." *Elrod*, 427 U.S. at 351. The Court held that this was enough to violate the First Amendment. *Id.* at 373.

As these holdings indicate, political patronage is an unconstitutional motive for retaliating against a nonpolitical public employee, regardless of whether the employee is politically active. Whether or not an employee works on campaigns, "patronage does not justify the coercion of a person's political beliefs and associations." *O'Hare Truck Serv.*, 518 U.S. at 718. The mayor and police chief could not constitutionally punish Heffernan, because "[a]fter all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights." *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014).

Indeed, Heffernan engaged in more political activity than the plaintiffs in *Rutan*, *Branti*, and *Elrod*. He obtained a Spagnola campaign sign for his mother. Yard signs are the quintessential medium of political speech in local campaigns. They are "a venerable means of communication that is both unique and important." *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994). Yard signs are the most effective way to express a political preference that will "reach *neighbors*, an audience that could not be reached nearly as well by other means." *Id.* at 57. To demote a public employee, on the ground that he helped his mother obtain a yard sign declaring support for an opposing

candidate, is a clear example of unconstitutional political retaliation.

The First Amendment protects the *freedom* of association, not just the act of associating. "Freedom of association," the Court has explained, "plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The freedom of association is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

Where the government is wrong as a constitutional matter, it is not off the hook because it also happens to be wrong as a factual matter. In such a case, officials "cannot demonstrate ... any government interest that tips the balance in their favor," *Lane*, 134 S. Ct. at 2381, because the government has no interest whatsoever in making erroneous employment decisions. Two wrongs do not make a right.

B. The Third Circuit's contrary view yields absurd results.

The Third Circuit's contrary view would lead to absurd results in any number of cases. For example, if a newly elected, paranoid mayor were to fire *all* municipal employees, on the factually incorrect ground that by serving under the previous mayor they had shown that they were politically disloyal, the mayor's action would be a clear violation of the First Amendment. *See, e.g., Rutan*, 497 U.S. at 74 ("Unless ... patronage practices are narrowly tailored to further vital government interests, we must

conclude that they impermissibly encroach on First Amendment freedoms."). Under the Third Circuit's view, however, the mayor would be allowed to fire all the employees, precisely because of the mayor's factual error concerning the employees' loyalty. After all, the employees had not actually exercised their First Amendment right to oppose the mayor.

Likewise, it would plainly violate the First Amendment for the state hospital to fire a nurse for giving speeches in her spare time in which she criticized American military policy. *See, e.g.*, *Garcetti*, 547 U.S. at 417-18 (emphasizing that the First Amendment protects the right of public employees to speak as citizens on matters of public concern unrelated to their jobs). But if it turns out that hospital officials were mistaken, and the nurse did not actually give any speeches about military policy, the state hospital would not be allowed to fire her on that ground. The state hospital would still have violated the First Amendment, because the motivation of hospital officials was based on their perception of the content of the nurse's speech. Under the Third Circuit's view, this case would come out the other way, because the nurse was not actually exercising her First Amendment right to criticize American military policy.

Similarly, it would be a clear constitutional violation for the Department of Motor Vehicles to fire a clerk because he is Muslim. But if it turns out that the clerk is in fact not Muslim, the Department does not thereby acquire the right to fire him on that ground. The officials who fired the clerk would still have violated the First and Fourteenth Amend-

ments, because their motivation was based on their perception of his religion. *Cf. Estate of Amos v. City of Page*, 257 F.3d 1086, 1094 (9th Cir. 2001) (allowing Equal Protection claim for discrimination against Native Americans on behalf of decedent whom police officers incorrectly believed was Native American) ("alleged discrimination is no less malevolent because it was based upon an erroneous assumption"). Under the Third Circuit's view, this case would also come out the opposite way, because the clerk was not actually exercising his constitutional right to practice Islam.[1] The sheer absurdity of these outcomes suggests that the Third Circuit's view cannot be right.

Under the Third Circuit's view, if Heffernan and another police officer had both picked up Spagnola campaign signs at the same time, and the second officer intended to support the Spagnola campaign, re-

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[1] The analogous question under Title VII has been more frequently litigated. *See, e.g.*, *EEOC Compliance Manual*, § 15-II, at 15-5 (2006), available at www.eeoc.gov/policy/docs/race-color.html ("Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong."); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 456 (5th Cir. 2013) (en banc) ("[W]e focus on the alleged harasser's subjective perception of the victim. Thus, even an employer's wrong or ill-informed assumptions about its employee may form the basis of a discrimination claim."); *Boutros v. Avis Rent a Car System*, 2013 WL 3834405, *7 (N.D. Ill. 2013) ("This argument is as offensive as it is incorrect. Avis cannot seriously contend that it was free to discriminate against Boutros on the basis of his perceived race—Arab—because it was unaware that he was actually ethnically Assyrian. Courts throughout the nation have considered and rejected this argument.").

spondents would have been allowed to fire Heffernan but not the second officer, solely because the two officers had different intents. The Third Circuit's focus "on the speaker's intent could lead to the bizarre result that identical [conduct] at the same time could be protected speech for one speaker, while leading to ... penalties for another." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (rejecting a test based on the speaker's intent for determining the level of First Amendment protection for political advertisements). "First Amendment freedoms need breathing space to survive. An intent test provides none." *Id.* at 468-69 (citation and internal quotation marks omitted).

The Third Circuit believed, Pet. App. 13a, that its erroneous view was commanded by a single sentence in *Waters*, 511 U.S. at 679: "We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." But the Third Circuit took this sentence out of context. The sentence appears in a paragraph that is about the Due Process Clause, not the First Amendment. The very next sentence in the paragraph reads: "Where an employee has a property interest in her job, the only protection we have found the Constitution gives her is a right to adequate procedure." *Id.* This paragraph of *Waters* simply states that an innocent mistake of fact does not by itself amount to a due process violation. *Waters* certainly does not suggest that an employer who makes a factual mistake is thereby given a free pass to violate other provisions of the Constitution.

C. The Third Circuit's view chills an enormous amount of political association and rewards politically vindictive supervisors.

The Third Circuit's view would have disastrous consequences for public employees. If a police officer can constitutionally be demoted because his supervisor incorrectly believes that the officer supports a candidate for mayor, then any public employee can constitutionally be fired because her supervisor incorrectly believes that she is a Democrat or a Republican. Employees would have to worry about saying the wrong thing at the office, for fear of leaving the boss with the wrong impression.

Indeed, they would have to worry about *anything* they might do, because there are so many ways of acting that can make coworkers suspect an affiliation with one party or the other. If the Third Circuit is right, it would be risky for a government employee to mention a story she saw on Fox News (for fear her boss might think she is a Republican) or a story she heard on NPR (for fear her boss might think she is a Democrat). The jokes employees tell at work, the hobbies they pursue, the kinds of music they listen to—all are fodder for dismissal by a politically-motivated boss, if the Third Circuit is correct that the First Amendment offers no protection. Every workday would bring a new challenge. Does an employee dare to drive a pickup truck, or a Prius? Does she let coworkers know she enjoys country music, or rap? Does she admit to being a member of the National Rifle Association, or the Sierra Club? The

Third Circuit's decision drastically curtails the First Amendment rights of public employees.

Such a workplace climate would also chill an enormous amount of *correctly*-perceived political affiliation. Even employees who are well-versed in First Amendment doctrine will realize their inability to predict the boss's perceptions with complete accuracy. And of course most public employees lack legal training. Without the knowledge necessary to identify when the boss is overstepping constitutional bounds, they will scarcely risk affiliating at all.

As a practical matter, public employees such as police officers are often inundated with requests from local campaigns and political parties to make contributions, attend fundraisers, and assist campaigns. These requests often come from incumbent candidates, who wield considerable power over municipal personnel decisions. If these employees cannot be reasonably confident that they will be protected from retaliation if their employer perceives an insufficient level of support, the pressures for political conformity will mount, and the First Amendment protections described in *Rutan*, *Branti*, and *Elrod* will be rendered toothless. *See, e.g.*, Ted Sherman, *Investigation Finds Elizabeth School Board Pressures Workers to Fill Campaign Coffers*, Newark Star-Ledger, May 22, 2011 (goo.gl/GF30Jp) ("Teachers and other employees, who kick in tens of thousands of dollars in donations, say they feel pressured by supervisors and board members to buy tickets to fundraisers. They say they are reminded that attending campaign events is in their best career interest."); Peter Schworm and Matt Carroll, *Fund-*

Raising from Employees Reveals Divide, Raises Ethical Questions, Boston Globe, Mar. 15, 2013 (goo.gl/QVe4Yx) ("When Plymouth County sheriff Joseph McDonald Jr. looks to raise money for his campaign fund, he often does not have to look far. Over the past five years, McDonald has raised about $123,000 in contributions from his 525 employees, almost $50,000 over the past two years alone."). *Cf. Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (noting the analogous pressure felt by lawyers to contribute to judicial campaigns).

In discerning the meaning of the First Amendment, the Court has always been concerned about "chilling the First Amendment rights of other parties not before the court." *Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 958 (1984). *See also Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (observing that this concern about chilling the speech of nonparties is the rationale for the overbreadth doctrine); *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (plurality opinion) (holding that the First Amendment protects lies, in part to avoid chilling truth-telling); *id.* at 2553 (Breyer, J., concurring in the judgment) (same). To allow Heffernan's supervisors to punish him for the purpose of deterring him from political participation will chill actual political participation on the part of countless other public employees on other occasions.

The decision below also creates a substantial disincentive for supervisors to learn and follow the law. Government officials in supervisory positions have an obligation to avoid basing personnel decisions on

unconstitutional criteria. But the more they can get away with, the less attention they will give to the constitutional limits on their authority. A supervisor given the green light to retaliate on factually-*incorrect* political grounds is hardly likely to be scrupulous about refraining from retaliating on factually-*correct* political grounds.

Moreover, the decision below makes no practical sense. The Third Circuit's view rewards the careless, politically-motivated supervisor, who is authorized to indulge his every whim concerning the political beliefs of his employees. The careless supervisor has license to make kneejerk disciplinary decisions without any factual investigation. Meanwhile the careful supervisor, who takes the trouble to learn whether his perception of an employee's political affiliation is actually correct, has no such license. The decision below perversely incentivizes government employers to make wild, baseless accusations about an employee's political beliefs, and then rewards them for being incorrect.

Public employees are not the only ones harmed by the decision below. The government itself is harmed, in part because the government has an interest in ensuring that officials in supervisory positions obey the Constitution, and in part because the government also has an interest in seeing that nonpolitical personnel decisions are based on merit rather than politics, for the obvious reason that decisions based on merit will yield better employees. And the public as a whole is harmed by the decision below, because ordinary citizens are the ultimate beneficiaries of merit-based public employment decisions. The public

has a substantial interest in better police officers, better teachers, better nurses, better firefighters—in short, better public servants.

The First Amendment can hardly permit careless, politically-motivated supervisors to punish employees where conscientious supervisors could not. When a public employee is demoted because his supervisor wrongly believes the employee has taken sides in an election, the supervisor is at fault just as much as he would have been if the employee actually had taken sides. The employee is harmed just as much. And the damage to all employees' First Amendment rights is at least as great, and likely greater, because of the dire consequences of giving the boss the wrong impression.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, NEW JERSEY, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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QUESTION PRESENTED

May a public employee who has not exercised any First Amendment right bring a First Amendment retaliation claim?

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BRIEF FOR THE RESPONDENTS

Respondents respectfully request that this Court affirm the judgment of the Third Circuit in this case.

STATEMENT OF THE CASE

Petitioner Jeffrey Heffernan is a retired officer in the Paterson, New Jersey, police force. Respondents are the City of Paterson and two officials: the mayor and the chief of police. Petitioner sued respondents under 42 U.S.C. § 1983 alleging a violation of his First Amendment rights, seeking compensatory damages, punitive damages, and attorney's fees. The case has a long procedural history, most of which is no longer relevant. *See generally* BIO 2-11 (describing three rounds of proceedings before different district judges and ensuing appeals).

At this stage, the operative allegations are as follows. In 2006, the City's incumbent mayor ran for re-election. Petitioner was then a police detective, assigned to work in the office of the chief of police. A member of the force saw petitioner holding a lawn sign supporting the mayor's opponent; that person reported what he saw to another officer, who in turn reported it to the chief. The chief reassigned petitioner to another position in the police department.

Petitioner did not actually support the mayor's opponent, however. In fact, petitioner did not live in the city and could not vote in the election. He had merely picked up the lawn sign and dropped it off at his mother's home (without even placing it on her lawn), as a favor to her.

Petitioner sued respondents. (Although a few allegations are individualized, we refer to "respondents" generally for simplicity.) Petitioner did not assert a claim under the New Jersey Civil Rights Act, which provides a cause of action for an "attempt" to violate an individual's civil rights. N.J.S.A. 10:6-1. Instead, petitioner alleged that the transfer violated his First Amendment rights.

Petitioner alleges that the transfer was retaliation for his perceived support of the mayor's opponent. Respondents, by contrast, contend that the transfer was based on petitioner's political *activity*, not his views. Petitioner held a sensitive and neutral position due to his assignment in the office of the police chief and yet became improperly involved in the mayoral race. Respondents also assert that the transfer was not an actionable adverse employment action. But, as the case comes to this Court, we accept petitioner's allegations *arguendo*.

The precise legal theory underlying petitioner's First Amendment claim is unclear in the complaint. But over the course of the case, he has alleged that respondents violated his right to free speech and his right to political association. Regarding the latter, petitioner has also alleged that, even if he did not actually engage in political association, respondents violated the First Amendment because they transferred him based on the mistaken belief that he had.

As relevant here, the district court rejected these theories on summary judgment and dismissed the complaint. The court found that petitioner provided no evidence that he personally engaged in speech or

political association. Instead, the district court found that he was simply performing an errand for his mother. "Most importantly, *Heffernan himself* asserted that he had no political connection to [the opponent]." Pet. App. 44a (emphasis in original).

The district court then rejected petitioner's argument that he could state a First Amendment claim on the theory that, even if he had not engaged in political association, respondents mistakenly believed he had. That claim failed, the court held, because "a First Amendment retaliation claim must be premised on an actual exercise of First Amendment rights." Pet. App. 53a.

The Third Circuit affirmed. Preliminarily, the court agreed that the facts precluded petitioner's claim that respondents acted in retaliation for his actual exercise of his First Amendment rights. Petitioner's own "unambiguous testimony," the court explained, left "no room" for that factual assertion. Pet. App. 9a-10a.

The Third Circuit then rejected the theory that petitioner could state a First Amendment claim because respondents *believed* he had engaged in protected activity when they transferred him, even though he never did. That claim failed, the court held, because it would "eliminate a traditional element of a First Amendment retaliation claim – namely, the requirement that the plaintiff in fact exercised a First Amendment right." Pet. App. 11a.

The Third Circuit distinguished several appellate rulings that petitioner claimed had recognized such "perceived association" claims. Those decisions, the court explained, in fact properly recognized claims by

individuals who had suffered retaliation for their constitutionally protected decision to remain *politically neutral*. Petitioner, by contrast, had not engaged in any form of political association at all. Pet. App. 12a-13a. The Third Circuit's ruling thus would not endanger "the right to speak on a political issue, to associate with a political party, or to not speak or associate with respect to political matters at all." *Id.*

Petitioner sought certiorari. He pursued only his "perceived association" claim, expressly abandoning any claim to have actually engaged in protected speech or association. Thus, while petitioner claims that he was "a close personal friend" of the mayor's opponent, whom he "wanted ... to win," Pet. Br. 3, in this Court he accepts both lower courts' findings that he engaged in no political association related to the election. *See also infra* at 9-10 n.1.

This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The premise of petitioner's First Amendment claim is that he did not engage in any speech or association protected by the First Amendment. He avowedly had no political association related to the mayoral race. But he alleges that the police chief believed he supported the opponent, and transferred him for that reason. Because the transfer was politically motivated, petitioner argues, it violated the First Amendment.

That argument is precluded by settled precedent. A political motivation for an adverse action is a *necessary* condition for petitioner's claim, but is not *sufficient*. This Court has uniformly held that a

public employee alleging that a disciplinary action violated her right to free speech or political association must first prove that she engaged in protected activity. If she does not, "it is unnecessary for [the court] to scrutinize the reasons for her discharge .... even if the reasons for the dismissal are alleged to be mistaken or unreasonable." *Connick v. Myers*, 461 U.S. 138, 146-47 (1983) (citations omitted).

Although petitioner contends that the Third Circuit erred because it deemed respondents' "mistake" to negate their liability, that is backwards. The court of appeals' straightforward holding was that petitioner's First Amendment claim failed because he did not engage in any First Amendment activity, a point unaffected by any "mistake." Meanwhile, it is petitioner who attempts to *create* liability out of respondents' mistaken impressions. All agree that, if the chief of police *correctly* understood that petitioner was not a supporter of the mayor's opponent, he could constitutionally transfer him for any reason or none at all. Petitioner thus has no First Amendment interest in his claim, and respondents' improper motivation is not sufficient to give him one.

Indeed, petitioner's position cannot be reconciled with the established regime for asserting this kind of First Amendment claim. For example, given petitioner's view that the employee need not have engaged in protected speech or association *at all*, presumably the employee need not prove that he spoke (1) non-disruptively (2) on a matter of public concern (3) outside his job responsibilities. *But see Garcetti v. Ceballos*, 547 U.S. 410 (2006). Petitioner

must also dispense with the established *Pickering* framework, under which the dispositive question is whether the employee's interest in the speech outweighs the government's interest in the orderly function of the public workforce. Because, on petitioner's view, the employee need not have engaged in speech at all, there is no free speech interest to weigh in the balance.

The few cases petitioner cites actually reject his position. He principally relies on *Waters v. Churchill*, 511 U.S. 661 (1994). The question in *Waters* was whether an employee who engages in constitutionally protected speech or association states a claim if the employer believed he did not engage in any protected activity. The plurality held that the employer is not liable if its conclusions were based on a reasonable investigation. But consistent with all of this Court's precedent, every member of the Court recognized that such a "good faith" defense is not even relevant unless the employee first proves that he engaged in protected activity. This makes perfect sense because, under the established two-part test, the presence of an improper motive is only the necessary *second* step: its presence alone does not create a claim. If this Court somehow reads this line of cases to say otherwise, those decisions should be overruled.

Petitioner's policy arguments would not justify departing from this Court's clear precedents, but they lack merit in any event. It is well settled that the Constitution generally leaves public employers free to manage their workforces. This Court's decisions thus reject efforts like this one, which seek to constitutionalize the employee grievance process.

But that is exactly what a decision recognizing petitioner's First Amendment claim would do, seriously disrupting the administration of public employment. Numerous claims that would have failed because the employee did not engage in constitutionally protected activity could now be brought on the theory that the employer mistakenly *thought* he had – for example, because of rumors regarding the employee's beliefs or association. And because this claim relies *entirely* on the employer's secret motivations, it will be largely impossible to defeat before expensive discovery and trial. Failed applicants for governmental positions could bring such claims as well, giving almost every disappointed government petitioner a plausible threat of suit.

This novel and destructive expansion of First Amendment doctrine is unnecessary, given that existing law provides extensive protections for public employees. The First Amendment protects all political views, including the decision to remain neutral. Its protections furthermore apply even if the employer misunderstands the precise nature of the employee's speech or association: For example, a Republican employee disciplined on the mistaken belief that he is a Democrat certainly has a viable constitutional claim. By contrast, petitioner's claim fails only because he did not engage in any protected speech or association *at all*.

Still other protections exist in a "powerful network of legislative enactments" and bargaining agreements. *Garcetti*, 547 U.S. at 425 (collecting citations). For example, New Jersey law provides a statutory right of action for an "attempt" to violate an individual's civil rights. N.J.S.A. 10:6-1 et seq. That

language may capture petitioner's claim that respondents sought to discipline him for political reasons, but petitioner omitted that cause of action from his complaint. Petitioner may have had recourse to such statutes or other civil service protections, but not the First Amendment.

ARGUMENT

I. Petitioner's First Amendment Claim Fails Because He Did Not Engage In Any Protected Activity.

A. Petitioner Has No Constitutional Claim Because Respondents Did Not Infringe His First Amendment Rights.

The premise of petitioner's First Amendment claim is that he did not engage in any activity protected by the First Amendment. If that sounds strange, that is because it is. Petitioner's theory is that, although the government did not actually infringe his First Amendment rights, he can state a claim – indeed, a claim for punitive damages – because the government *thought* it had.

That argument lacks merit. The court of appeals recognized that petitioner's argument would require it "to eliminate a traditional element of a First Amendment retaliation claim – namely, the requirement that the plaintiff in fact exercised a First Amendment right." Pet. App. 11a. Settled precedent provides that the employee's claim must be based on "an employee's actual, rather than perceived, exercise of constitutional rights." *Id.* (citations omitted). That rule extends to a case like this one, "where the employer's retaliation is

traceable to a genuine but incorrect or unfounded belief that the employee exercised a First Amendment right." *Id.*

Petitioner's contrary theory rests on the odd view that *the government*'s motives for the *subsequent* actions it has taken against him somehow affect the First Amendment status of *his own* prior acts, which he *already* undertook. Petitioner avowedly had no political association related to the election for city mayor: He did pick up a sign supporting the mayor's opponent; but he did so for his mother and – absent respondents' subsequent response – could not have claimed this to be an act of protected speech or political association at all. Petitioner's allegation is nonetheless that respondents transferred him because the police chief *wrongly* believed he supported the opponent. And because the transfer was politically motivated, he says, it violated the First Amendment, whether he was actually engaged in protected activity or not.[1]

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[1] The district court reviewed the summary judgment record and "found that Heffernan had failed to produce evidence that he actually exercised his First Amendment rights." Pet. App. 5a. On petitioner's appeal, the court of appeals expressly affirmed that ruling, recognizing that petitioner had "repeatedly disavowed" engaging in any actual association in "unambiguous testimony." *Id.* 9a-11a. Petitioner chose not to seek this Court's review of that holding. Thus, the premise of the case in this Court is that petitioner, who was not a city resident, simply remained politically agnostic. *See, e.g.*, Pet. 7 (question presented is whether the employee may "be disciplined because his supervisor *perceives a political association that does not in fact exist*" (emphasis added)); Cert. Reply 5 (arguing that the Court should not defer review to allow time for lower courts to

The force of this argument is driven by the gestalt reaction that "you can't do that" – *i.e.*, that a public employer cannot discipline an employee based on politics, and that there is something to be gained from punishing that motive wherever it can be found. But, quite apart from the doctrinal issues discussed below, there are three key problems with this view.

First, it does not track petitioner's personal interest in his own lawsuit at all. From petitioner's perspective, the fact that respondents were driven by politics is happenstance. Petitioner could only have a theoretical interest in retaliation against protected activity because *he has not engaged in any*. From his standpoint, the important feature of his claim is that respondents injured him by transferring him based on a mistake. But under settled law, that allegation does not make out a claim under the Constitution, which does not restrict the general management of public workforces. *See, e.g.*, *Connick*, 461 U.S. at 146-47.

To see this more clearly, it helps to recognize that the only reason petitioner's transfer even arguably implicates the First Amendment for him personally is because he *heard* it was politically motivated. If petitioner had never learned that fact, the effect of the transfer on him, and his personal First Amendment interests, would have been the

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consider issues related to misperceived political neutrality, because this case does not involve "those questions"). Accordingly, the Court need not decide whether petitioner's relationship with his friend would amount to protected association in other circumstances.

same – that is, none, because he had no First Amendment activity to protect in the first place. The same would be true if petitioner had not in fact picked up the sign, but the chief of police had transferred him after hearing a false rumor otherwise; or if respondents' reason for transferring him was pure mean-spiritedness, completely unrelated to the election or any other political consideration. In those examples, the transfer would have caused petitioner the same First Amendment injury as he suffered on the facts he alleges here: None at all.

Second, while petitioner suggests that it is important to root out the bad motive of political discipline, his rule actually does nothing to advance that goal. It is already settled that the First Amendment applies when the government disciplines a non-policymaking employee who engages in constitutionally protected speech or association. *See, e.g.*, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716-17 (1996). When an employer takes adverse action against an employee based on the *mistaken* belief that the employee has engaged in speech or association, the employer *by definition* believes the conditions for a valid First Amendment claim exist and is either ignorant of this Court's precedents or has decided to violate them. For example, in this case, petitioner alleges that respondents believed they were transferring him for political reasons, in violation of settled law. If that is right, respondents would not have acted any differently if they had known about an additional rule prohibiting retaliation based on *misperceived* political affiliations (because, of course, they did not

know they were "mistaken"). So if respondents had known the rule petitioner advocates, they would have done nothing differently; petitioner's rule would not have helped to protect him in any way from bad motivations, nor would it protect anyone else.

Finally, it is important to note that petitioner's intuitive objection seriously overstates the constraints that the First Amendment imposes on public employers. "Politics" is an essential element of the democratic process generally, and so it is well accepted with respect to the governmental workforce, for example, that confidential and policymaking employees can be subject to hiring and termination on that basis. *See, e.g.*, *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The Framers obviously never contemplated eliminating political considerations from government decision making, an effort that would interject the federal courts as the constant overseers of public employment. It is thus one thing to provide a claim to a particular class of employees who can show that they were engaged in precisely the kind of activity the Constitution protects, but quite another to give a claim to individuals who are *not* engaged in that activity because they think they can put their finger on a "bad motive" and thereby try to scrub it from all public decision making. The latter does not advance the cause of any person engaged in constitutionally protected activity, but – as further explained below – does allow a class of employees with no personal constitutional interest to bring suits that are difficult to defend and will substantially disrupt public workforces.

B. Petitioner Greatly Overstates The Breadth Of The Court Of Appeals' Ruling.

Relatedly, petitioner badly misunderstands what is at stake in this case by framing it as one in which respondents were allegedly excused from liability by their "mistake" in believing that petitioner was associated with the mayor's opponent. Pet. Br. 9. He asserts that "[r]espondents' factual mistake did not cure their constitutional mistake." *Id.* That view gets the case precisely backwards. The court of appeals did not think that respondents' misunderstanding of the facts was a defense. It never doubted that petitioner adequately alleged that respondents acted with an improper motivation, which caused them to transfer him and resulted in his injury. Petitioner's claim did not fail because he was not "politically active," *id.* 10, or provided "an insufficient level of support," *id.* 12. Instead, the court of appeals rejected petitioner's First Amendment claim on the obvious ground that he had not engaged in any activity protected by the First Amendment, Pet. App. 10a-11a; were that not true, petitioner would have a claim. As petitioner elsewhere acknowledges, the basis for the ruling below was that he "had not *actually engaged in any political association*," such that "his supervisors could not have abridged his freedom of association by punishing him." Pet. Br. 19.

Instead, it is petitioner who erroneously treats respondents' error as a dispositive factor. He argues that it is the basis for *imposing* liability. All agree that if respondents had accurately understood the facts – that is, if they knew that he was merely

picking up the sign for his mother – they would have been perfectly entitled under the Constitution to transfer him, because the Constitution is not concerned with family errands. Accordingly, the *only* role mistake plays in this case is to allow petitioner to create a new constitutional claim where no such claim would otherwise exist.

And because petitioner misunderstands the basis for the court of appeals' decision, he greatly overstates its relevance to public employment. To begin with, it is patently wrong to represent that, even with respect to employees who *do* exercise their right of speech and association, the ruling below "would allow the government to retaliate against employees for their speech on matters of public concern, so long as their supervisors misunderstood what the employees said." Pet. 11. The Third Circuit's ruling applies only in the context of employees who engage in no First Amendment protected activity. Pet. App. 11a-13a.

Further, this Court's precedents already protect public employees' conscious decisions to remain neutral as between political viewpoints, just as it protects their rights to associate with one political viewpoint or another. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 351 (1976). The court of appeals thus distinguished this case from "natural applications of the settled First Amendment principle that an employer may not discipline an employee based on the decision to remain politically neutral or silent." Pet. App. 12a (citations omitted). Nothing about the ruling below would endanger "the right to speak on a political issue, to associate with a political party, or

to not speak or associate with respect to political matters at all." *Id.* 13a.

But the constitutional protection afforded political neutrality does not aid petitioner. The court of appeals explained that petitioner "has not presented evidence that he was retaliated against for taking a stand of calculated neutrality. Instead, he argues that [respondents] demoted him on a factually incorrect basis." *Id.* The point of the court of appeals' ruling is that, if petitioner *were* an Independent and respondents mistakenly believed otherwise, he would have a claim; and likewise, his claim does not mystically arise from a mistake about his affiliation if he has no protected affiliation in the first place. Simply put, the mistake has nothing to do with whether he has a constitutionally protected right, and it is only respondents' position that is consistent on this front.

Further, the inquiry under the First Amendment is whether the employer acted on the basis of the employee's speech or association, at a high level of generality. The employer need not know – or even care – precisely what the employee said or believed. For example, if a public employee engages in speech on a matter of public concern, it is no defense that the employer did not know what he said but fired him upon merely hearing that he was speaking in the office or to the press. *See Waters v. Churchill*, 511 U.S. 661 (1994) (holding that employee has burden to prove that employer acted on the basis of speech or association, then employer may prove that after reasonable investigation it believed the employee had not engaged in protected activity). For that reason, it does not matter if the employer acts on a *mistaken*

understanding of precisely what the employee said or believed – all that matters is the *existence* of protected activity, and retaliation on that front.

Here, respondents made a "mistake" only in the very particular sense that they erroneously believed that petitioner had engaged in political association *at all*. This case is thus very different from one in which the employer alleges that a public employer got the *details* wrong – for example, that he engaged in constitutionally protected association with one political viewpoint (say, he was a Republican) but the employer "mistakenly" believed he supported another (a Democrat). If the employee has a political association – in that instance, his affiliation with the Republican Party – and the employer disciplines him for political reasons, the employee has stated the threshold elements of a claim. The fact that the employer makes a "mistake" about *which* political party the employee belongs to is no defense.

C. This Court's Precedents Squarely Hold That A Public Employee Must Establish At The Threshold That He Engaged In Speech Or Association Protected By The First Amendment.

Even if petitioner could plausibly claim that the First Amendment protects not only the actual exercise of associational rights, but also the *misperceived* exercise of speech and free association, the question in this case is not whether the government can jail someone based on the mistaken belief that he engaged in protected First Amendment activity – petitioner alleges only that he was transferred from one public job to another less

desirable government position. He thus raises an unconstitutional conditions claim, which is one step removed from the core of the constitutional protection. The case is yet further removed from the principal concerns of the First Amendment because petitioner raises his unconstitutional conditions claim in its most disfavored context: public employment, an area in which this Court has repeatedly recognized that First Amendment interests must give way to the government's countervailing need to operate its workforce without undue judicial intrusion. *See, e.g.*, *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011); *Garcetti*, 547 U.S. at 418-19; *Connick*, 461 U.S. at 149.

Accordingly, correctly understood, petitioner's claim gives rise to a precise legal question: does a public employee who has not engaged in any activity protected by the First Amendment have a First Amendment right, redressable through a tort suit, not to be disciplined by a public employer who mistakenly believes he has? Put another way, can a public employee who has not exercised any First Amendment rights nonetheless state a First Amendment claim for damages? The answer to that question is "no."[2]

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[2] Because this case arises in the special context of public employment, the decision in this case will not dictate whether the Government may punish individuals, or deny them other kinds of government benefits, on the basis of perceived political association or other First Amendment activity.

As applied to state and local governments, the First Amendment provides in relevant part that the government shall make "no law . . . abridging the freedom of speech, . . . [or] the right of the people peaceably to assemble." U.S. Const. amend I. By definition, the government cannot "abridge" a "right" of an employee who does not even seek to exercise it. Petitioner identifies no historical evidence of any circumstance in which the Framers or this Court previously understood the First Amendment to operate any differently. The statute petitioner invokes to assert his cause of action, 42 U.S.C. § 1983, is similarly limited in relevant part to instances in which the plaintiff is "depriv[ed] of any rights . . . secured by the Constitution." Extending the right to bring tort suits under the Bill of Rights to public employees like petitioner who do *not* exercise the rights it enumerates demeans both the protections the Constitution provides to individuals and also the authority its other provisions reserve to the states and their constituent local governments to manage their internal affairs.

Consistent with the constitutional text, this Court's precedents make clear that a First Amendment claim arising from the discipline of a public employee begins with one threshold question: did the employee engage in constitutionally protected speech or association? If not, any further inquiry – which necessarily would intrude on the operations and prerogatives of government employers – is unnecessary. On petitioner's view, every one of this Court's decisions setting forth that threshold requirement, along with the hundreds (if not thousands) of lower court rulings applying the same

rule, were all wrong. What was previously regarded as the foundational feature of the employee's claim was actually irrelevant as a matter of law.

1. As least before this case, it was well settled and well understood that under this Court's precedents, "[a] court first determines whether the plaintiff's speech was expressed 'as a citizen' on a 'matter[] of public concern.' If it was not, the First Amendment claim fails." U.S. Br., *Garcetti v. Ceballos*, 547 U.S. 410 (2006), at 10 (quoting *Connick*, 461 U.S. at 140 (quoting, in turn, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968))). This Court's classic statement of the rule, in *Connick v. Myers*, all but rejects petitioner's argument in terms. If the employee has not engaged in what can

> be fairly characterized as constituting speech on a matter of public concern, *it is unnecessary for us to scrutinize the reasons for her discharge*. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review *even if the reasons for the dismissal are alleged to be mistaken or unreasonable*.

461 U.S. at 146-47 (emphasis added) (footnote and citations omitted).

Numerous precedents apply that rule. For example, the question in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), was the proper standard to apply in so-called "mixed motive" cases in which the employer acted for multiple reasons, only one of which was the employee's speech. The Court held that in such a case – in which the employer's motivation is by definition a central feature – the employee must "show that *his conduct was constitutionally protected*, and that this conduct was a 'substantial factor'" in the employment decision. *Id.* at 287 (emphasis added) (footnote omitted). The government could then seek to defeat the claim by showing "that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.*

More recently, this Court reaffirmed in *Garcetti v. Ceballos* that the "first" inquiry in such a case is "whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." 547 U.S. at 418 (citation omitted). In that case, the employee engaged in speech. But the Court held that employee had no personal First Amendment interest in that speech because it was made in the course of his job responsibilities. No further inquiry was required. But on petitioner's view, the case was not necessarily over. The same employee could proceed with his suit, and prevail, on the same facts, based on the allegation that the employer *mistakenly believed* that his non-protected speech was actually outside his job responsibilities. And the employer could well make such a mistake, as *Garcetti* itself recognized that the

bounds of the employee's duties may not be obvious from his job description. *Id.* at 424-25.

2. Beyond this Court's uniform articulation of the governing legal rule, petitioner's argument cannot be reconciled with the established structure under which such claims are resolved. Petitioner's assertion that his "would be a simple rule for courts to administer," Pet. Br. 10, and "a bright line rule," *id.* 19, is just a backhanded acknowledgment that he would eliminate several elements of the claim outright. This is not minor surgery; petitioner attacks well-settled law with a cleaver.

The fact that employees would no longer be required to prove that they engaged in political association or constitutionally protected speech is just the beginning. In a speech case, petitioner's logic would also require eliminating the requirements that the employee prove that he was acting outside of his ordinary job responsibilities and that he was speaking non-disruptively on a matter of public concern. Those are merely means to prove that the employee's speech was constitutionally protected. But on petitioner's view, none of these requirements has any logical relevance; the government's motivation is sufficient to transform his actions into an act of fully constitutionally protected speech or association, even if he has not spoken at all.

Also, what becomes of the famous *Pickering* doctrine, which provides that a public employee's speech is protected if his interest in expression outweighs the government's interest in managing the workplace? 391 U.S. at 568. Under the *Pickering* framework, "First, a court must determine whether the employee spoke 'as a citizen on a matter of public

concern'; if not, the First Amendment *provides no protection*." U.S. Br., *Lane v. Franks*, 134 S. Ct. 2369, at 12 (emphasis added). When the employee in petitioner's position has not even *engaged* in protected speech, he has no First Amendment interest to weigh in the balance. Yet petitioner insists that the employee will still prevail.

Petitioner's argument also cannot be reconciled with the related principle that a First Amendment claim arises only if the challenged adverse employment action is material. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006) (in Title VII context, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse"); *Wrobel v. County of Erie*, 692 F.3d 22, 31-32 (2d Cir. 2012) (applying same rule to First Amendment retaliation claims); *Couch v. Bd. of Trustees of Mem'l Hosp. of Carbon Co.*, 587 F.3d 1223, 1238 (10th Cir. 2009) (same). Lesser actions are not actionable because they do not constitute a sufficient infringement upon the employee's rights of speech or association. *Id.* Imagine that petitioner actually *was* associated with the mayor's opponent and the chief of police had publicly criticized him for those views. By definition, those would be more direct infringements on protected associational rights than petitioner asserts in this case. But he would still have no First Amendment claim.

Illogically, petitioner's proposed rule recognizes a claim only for employees whose First Amendment rights have not been infringed *at all*, much less materially. It makes no sense to say that an employee asserting a traditional First Amendment

claim who actually engaged in constitutionally protected activity bears the burden of proving that the employer's conduct had a *material* effect on his rights, while relieving a set of employees who do not even engage in protected activity from showing how that (*non*)-exercise could have been materially affected by the adverse actions against them. The ironic result is that the plaintiff has burdens in cases in which he has actually exercised a protected right that do not apply if he avoided engaging in the actions that the Constitution protects.

Conversely, petitioner would substantially rework existing law by imposing a *greater* obligation on the employee to prove the employer's motivation. Presently, the employee need only prove that the public employer acted on the basis of the employee's speech or association. *See supra* at 16. As discussed, it makes no difference whether the employer misunderstood the details – such as with whom the employee associated. But not according to petitioner: For the employee to establish that the employer made a mistake, he would have to plead and prove what exactly the employer knew.

None of this makes any practical sense. According to petitioner, the employee no longer pleads and proves things he knows: that he engaged in protected speech or association and the nature of his interest in that expression. Instead, none of that matters and he instead must plead and prove the thing he is least likely to know: what precisely was in the employer's head. The result, as explained below, is to vastly multiply the cases that are hardest to prosecute and defend, while eroding the gatekeeper rule that fully distinguishes serious

assertions of constitutional rights from those that should not detain the courts or disrupt the operation of the public workforce.

II. Recognizing Petitioner's Claim Would Significantly Disrupt The Orderly Functioning Of The Public Workforce.

The radical change in settled law wrought by petitioner's rule would seriously disrupt governmental workplaces, vastly expanding public employers' exposure to litigation and complicating their ability to defend against those claims in court. Take three terminated public employees: one speaks on a matter of public concern but in a manner that is disruptive to the workplace; one speaks on a matter of private concern; and one does not speak at all in any relevant sense. None of them engaged in protected First Amendment activity. Thus, under existing law, none can threaten and bring a Section 1983 claim, because the employer can win by showing the absence of protected activity before getting into any fight about the employer's motivations. *See Connick*, 461 U.S. at 146, 151-52.

But according to petitioner, *all* of these employees can bring their claims. The first can say the employer *falsely* believed the speech was not disruptive; the second can say the employer *falsely* believed the speech related to a matter of public concern; and the third can say the employer *falsely* believed he had said something protected when he had not. The public employer will be required to defend *all* of these cases, including being subject to expensive and distracting discovery, in an effort to disprove a disputed fact about his motivations for

acting. Given how hard these kinds of subjective facts are to *dis*prove, the odds of avoiding summary judgment and being forced to trial or settlement are overwhelming. And all of these costs are being imposed in the name of the First Amendment, even though *everyone agrees* that none of these employees actually engaged in constitutionally protected free speech.

The range of things that could give rise to a claim that a public employer had a "mistaken" impression about the employee's political affiliation is almost limitless. As petitioner enthusiastically explains, such a claim could arise from "*anything* they might do, because there are so many ways of acting that can make coworkers suspect an affiliation with one party or the other," such as the radio stations they listen to, "[t]he jokes employees tell at work, the hobbies they pursue, [and] the kinds of music they listen to." Pet. Br. 26 (emphasis added). All that is required to move forward in such a suit is a rumor arising from any of those commonplace acts.

The adverse consequences of petitioner's rule are multiplied exponentially when one realizes that it would necessarily apply to every person who applies for a government job or contract, but does not get what he seeks. *See, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76-79 (1990). So the perfectly well-intentioned supervisor must worry not just about the times he disciplines one of the discrete set of employees under his oversight – which may occur rarely – but all the times he does not hire or contract with someone. And of course there can be twenty applicants (or more) for every single position that comes open. Take this case. According to petitioner,

every officer from both within and outside the city who applied to replace petitioner in the office of the chief of police, but did not get the job, could claim that respondents mistakenly thought that they too were supporters of the mayor's opponent or engaged in constitutionally protected speech.

It gets worse. To successfully state a claim, the plaintiff would not even have to prove that his perceived speech or association was the "but for" cause of his treatment, the typical standard in other areas of the law. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524-25 (2013). Instead, a claim could arise – and proceed in court – if the employer's (mis)perceptions were merely a motivating factor; the employer would then bear the burden of proving that it would have taken the same action for legitimate reasons. *See Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977).

These "burden-shifting" dynamics radically change how these claims work in practice – allowing them to be transformed into all-purpose employment grievances only loosely tied to the First Amendment question at issue. Once an employee alleges that some false subjective belief about their political affiliations *partially* motivated the action against them, most cases will devolve into a dispute about whether the employer took similar actions against similar or worse employees. In that guise, the claimant can smuggle in non-constitutional disputes about whether they were treated worse than employees who were less qualified, with judges or juries entitled to *assume* that inferior treatment related to the alleged First Amendment motive

rather than the myriad other motivations that cause employers to disfavor certain employees. Ordinarily, these free-form employment disputes are blocked by a reasonably strong gatekeeper rule: The employee needs to at least show that they actually engaged in protected activity, and that the employer had some way of knowing about it. But without that rule, the inevitable battle of alleged secret motivations will end up being a dispute about whether an employee *ought* to have been disciplined, whether that discipline related to constitutional issues or not.

In that world, not only would the government bear the costs discussed above, but the entire dynamic of employee discipline would change for the worse. An employer would no longer be able to take *any* action without opening itself to the claim that it acted for a mistaken, unconstitutional reason. It is not clear how the employer would even insulate itself from the claims petitioner would recognize.

The adverse effects of petitioner's rule for public employers are obvious and unacceptable. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418 (citations omitted). This Court's precedents already impose restrictions that are difficult to navigate for public employers, which must assess, for example, the nature of the employee's position, whether any speech is on a matter of public concern or disruptive, and whether any discipline is imposed on the basis of an adequate investigation. *See Waters*, 511 U.S. at 692-93 (Scalia, J., concurring in the judgment). If liability could

arise from the employer's *mistaken* understanding of those and other issues, those difficulties would be multiplied.

Worse still, the new doctrine that petitioner would create seemingly would not even be limited to the public employment context. The root of such claims is the principle that "subjecting a nonconfidential, nonpolicymaking public employee to penalty for exercising rights of political association [i]s tantamount to an unconstitutional condition." *O'Hare Truck Service*, 518 U.S. at 718 (citations omitted). This Court has thus recognized that all manner of government actions can be subject to First Amendment, unconstitutional-conditions claims.[3]

There are numerous examples outside the First Amendment context as well. For example, the constitutional right to travel precludes state officials from denying certain benefits to individuals on the ground that they recently moved to the state. *See,*

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[3] *See, e.g.*, *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 161 (2013) (denial of license to practice law); *Crawford-El v. Britton*, 523 U.S. 574, 578 (1998) (correctional officer "deliberately misdirect[ing] boxes" of prisoner's personal belongings during prison transfer); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (non-renewal of government contract); *O'Hare Truck Svc.*, 518 U.S. at 726 (termination of at-will contract); *Lyng v. Intn'l Union*, 485 U.S. 360, 364 (1988) (denial of food stamps); *Am. Party of Texas v. White*, 415 U.S. 767, 780 (1974) (denial of place on ballot); *Healy v. James*, 408 U.S. 169, 181 (1972) (denial of official recognition to university group); *Aptheker v. Sec. of State*, 378 U.S. 500, 505-08 (1964) (denial of passport); *Am. Comm. Ass'n v. Douds*, 339 U.S. 382, 390 (1950) (denial of benefits of federal labor law).

e.g., *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974). Accordingly, a county hospital cannot deny indigent care to a newcomer based on her having moved to the state less than a year ago. *Id.* But on petitioner's theory, it should also be unconstitutional to deny services to a lifetime resident of the state whom the hospital wrongly *believed* was a recent immigrant to the state.

In all those other contexts, a plaintiff who does not actually engage in any constitutionally protected activity would logically now be able to assert a claim under Section 1983 on the ground that the government mistakenly thought he had. But there is of course no precedent allowing such a claim in any context, even though the individual generally has a *stronger* claim in those other settings, in which there is no countervailing governmental interest in managing the public workforce:

> Our unconstitutional conditions precedents span a spectrum of government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to claimants for tax exemptions, users of public facilities, and recipients of small government subsidies, who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing.

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 680 (1996) (citations omitted).[4] Petitioner's rule is thus

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[4] Nor has the Court applied similar prophylactic rules based on officials' perception of the facts in other important contexts. For example, there would be no violation of a suspect's Fourth Amendment rights if the police found incriminating evidence through a warrantless search of what they believed to be the suspect's home if, in fact, the suspect was simply visiting the apartment for a business transaction. *See Minnesota v. Carter*, 525 U.S. 83 (1998). Whether the Constitution was violated in that circumstance depends on whether the suspect was in fact exercising his right to constitutionally protected privacy within his own home. *Id.* at 90. Similarly, there would be no Sixth Amendment violation in questioning a suspect outside the presence of his lawyer if the suspect had not invoked his right to counsel, even if the investigators wrongly believed he *had* invoked that right. *See Montejo v. Louisiana*, 556 U.S. 778, 786, 789 (2013) (prohibition against police questioning defendant outside presence of counsel only applies after defendant invokes his right to counsel). And there would be no violation of the Double Jeopardy Clause in bringing a second prosecution against a defendant for what is, in fact, a different offense, even if the prosecutors honestly believed they were the same offense. *See, e.g.*, *Brown v. Ohio*, 432 U.S. 161, 166 (1977) (test for double jeopardy violation turns on whether "two offenses are sufficiently distinguishable"). In each of these examples, one could say that the government official was acting with an impermissible motive. And subjecting such officials to liability, despite the fact that they did not actually violate anyone's constitutional rights, could be said to serve an important deterrent effect, making clear to those who actually *do* qualify for constitutional protection that their right to do so is vigorously enforced. While those justifications might form the basis of prophylactic legislation, they do not suffice to transform what was, at most, an *attempted* constitutional violation into an actual one.

both novel and dangerous in *all* of the myriad contexts in which it would logically apply.

III. Petitioner's Arguments In Support Of His Novel Theory Lack Merit.

A. The Precedents Cited By Petitioner In Fact Preclude Recognizing His Claim.

Petitioner cannot identify any decision of this Court recognizing a claim resembling the one he asserts. He suggests that his position is supported by statements in this Court's decisions to the effect that a First Amendment claim arises when a public employer disciplines an employee "because" of his protected First Amendment activity. Pet. Br. 21. In his view, that language treats the employer's motivation as dispositive. *Id.* That is not correct. Consistent with all of the Court's uniform decisions articulating and applying the governing rule, that language refers to instances in which the employee in fact engages in constitutionally protected conduct. As the Court has explained, with emphasis notably in original: "The First Amendment's guarantee of freedom of speech protects government employees *because* of their speech on matters of public concern. To prevail, an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination." *Umbehr*, 518 U.S. at 675 (emphasis in original) (citations omitted).

Petitioner fares no better with his argument that this Court adopted the rule he advocates in two decisions. Principally, he cites *Waters v. Churchill*, 511 U.S. 661 (1994). In a sense, *Waters* presented the reverse of this case: the employee allegedly

engaged in in conduct that was constitutionally protected, but the government disciplined him in the mistaken belief that it was not. A four-Justice plurality concluded that the employer's belief was a defense to the employee's First Amendment claim, so long as it was based on a reasonable investigation in the circumstances. *See id.* at 677-79. Three Justices concluded that the employer's belief alone was sufficient to defeat liability. *Id.* at 686-89.

With almost no explanation, petitioner cites *Waters* as standing for the proposition that "[w]here a public employee is fired due to a supervisor's misperception of what the employee said or did, it is the supervisor's perception that matters." Pet. Br. 14. Petitioner apparently believes that because this Court discussed the employer's motivation, it held that was the only relevant question under the First Amendment. That is obviously wrong. The essential premise of *Waters* was that the employee – in stark contrast to petitioner – *had* engaged in constitutionally protected activity. The open legal question before the Court was whether, on that premise, the employer's understanding of the facts could nonetheless defeat the worker's claim. The Court certainly did not hold, as petitioner insists, that a public employee has a First Amendment claim if he does *not* engage in constitutionally protected activity but the employer concludes otherwise without conducting a reasonable investigation. Simply put, *Waters* holds that the employer's retaliatory motivation under the First Amendment is a *necessary* condition for a claim, not a *sufficient* one.

Petitioner thus ignores that every member of the Court in *Waters* made clear that, whatever the

government's belief, the employee must prove at the threshold that her speech was protected by the First Amendment. The plurality expressly concluded that, wholly apart from the employer's motivation, the employee *could not* attempt to establish liability based on "speech that was either not on a matter of public concern, or on a matter of public concern but disruptive." *Waters*, 511 U.S. at 681. Further, the employee's remaining claim that she had been terminated for other, constitutionally protected speech than that addressed by the Court's decision would turn on "whether those statements were protected speech, a different matter than the one before us now." *Id.* at 682. *See also id.* at 685 (Souter, J., concurring) (explaining that plurality opinion, which he joined, permitted liability only "assuming in each case that the speech was actually on a matter of public concern").

More broadly, the plurality reiterated that the Court has "never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." *Waters*, 511 U.S. at 679. Such claims, it explained, were properly brought "under states contract law, or under some state statute or common-law cause of action," or perhaps even "a federal statutory claim. Likewise, the State or Federal Governments may, if they choose, provide similar protection to people fired because of their speech. But this protection is not mandated by the

Constitution." *Id.*[5] Consistent with that understanding, the plurality explained that – wholly apart from any improper motivation by the government – the Court had "refrained from intervening in government employer decisions that are based on speech that is of entirely private concern." *Id.* at 674.

Next, Justice Scalia's opinion for three Justices explained that under the Court's ruling, even if the employer acted with an improper motivation, "presumably, the dismissal can still proceed even if the speech was not what the employer had thought it was, so long as it was not speech on an issue of public importance." *Waters*, 511 U.S. at 688. Liability for wrongful discharge would depend on "the protected speech that the jury later finds." *Id.* at 694. This is essentially the exact opposite of the rule the petitioner asserts here, and for which he claims support in *Waters*.

Even Justice Stevens's dissenting opinion for two Justices, which took the broadest view of employees' First Amendment rights, concluded that "[t]he critical issues in a case of this kind are (1) whether the speech is protected, and (2) whether it was the basis for the sanction imposed on the employee."

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[5] Petitioner contends that this language refers to a claim under the Due Process Clause. Pet. Br. 25. That is not accurate. No such claim was asserted in *Waters*. The relevant passage discusses only free speech. And the Court's recognition that an employer's mistake is not a basis for a claim closely tracks its prior conclusion to the same effect in *Connick*. *See supra* at 19.

Waters, 511 U.S. at 695. Liability in the case therefore depended on the "assum[ption] that [the employee's] statements were fully protected by the First Amendment." *Id.* The dissent similarly understood the majority to apply only to "speech that was in fact protected." *Id.* at 698 n.4.

Finally, petitioner ignores that the reason the Court took the employer's subjective beliefs into account was to *mitigate* the burdens of allowing public employees to challenge employment decisions on First Amendment grounds. *See Waters*, 511 U.S. at 671-77. That is, the Court allowed the employer's reasonable mistake to furnish a defense to what would otherwise be an obvious First Amendment violation, explaining that the lower court's failure to do so "gives insufficient weight to the government's interest in efficient employment decisionmaking." *Id.* at 675.[6] The Court said nothing to suggest that it intended its decision to provide a pathway for making

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[6] Thus, under *Waters*, whether the employer made a "mistake" is relevant not to the plaintiff's claim but instead to the public employer's defense. The government is not liable if it proves that it conducted a reasonable investigation and nonetheless mistakenly concluded that the employee's conduct was not constitutionally protected. In this case, respondents assert, *inter alia*, that they have a constitutionally valid policy that high-level police officers would not be politically active. They maintain that petitioner was violating that policy or at least they made a reasonable mistake in thinking he was. But because petitioner did not engage in political association at all, what respondents did and why they did it plays no role in the First Amendment inquiry unless petitioner first proves that he engaged in constitutionally protected activity.

First Amendment claims against government employment decisions easier and more abundant.

Petitioner also relies on *Rankin v. McPherson*, 483 U.S. 378 (1987). Pet. Br. 15. The plaintiff in *Rankin*, a clerical employee in a constable's office, was terminated for saying that if an attempt was made on the President's life, "I hope they get him." 483 U.S. at 380. The Court concluded without difficulty that the potential assassination of the President was obviously a matter of public concern. *Id.* at 388. It expressly held – in direct conflict with petitioner's argument in this case – that the protected nature of the employee's speech was a precondition to her claim: "The threshold question in applying [the *Pickering*] balancing test is whether [the employee's] speech may be fairly characterized as constituting speech on a manner of public concern." 483 U.S. at 384 (citations and internal quotation marks omitted).

According to petitioner, the "important thing" in *Rankin* "was the constable's perception of the clerk's speech, not the clerk's intent in speaking." Pet. Br. 15. That gets *Rankin* backwards: *Rankin* expressly held that the only aspect of the employer's perception at issue in the case – its subjective belief that the employee's speech showed that she was unsuitable for a law enforcement workplace – was *un*important, given the employee's mere clerical role. 483 U.S. at 390.

Petitioner argues that his position is also supported by the principle that "'there is no requirement that [employees] . . . have been coerced into changing, either actually or ostensibly, their political allegiance.'" Pet. Br. 16 (quoting *Branti*, 445

U.S. at 517). But that has nothing to do with the question presented. Instead, the issue is whether the employee must have exercised First Amendment rights. Whether the employer's response changed the employee's views is irrelevant.

Respondents' further reliance on cases involving the First Amendment's protections relating to "loyalty oaths," "charitable solicitation," and "cross-burning" is unfounded. Pet. Br. 18. He explains that the Court has expressed concern with the prospect that government would misperceive the expressive activity in question. *Id.* Fair enough. But the salient doctrinal point is that the Court has never held that the First Amendment would recognize a claim on behalf of an individual who did not sign a loyalty oath but was thought to; a person who did not make a charitable solicitation but was thought to; or a person who did not burn a cross but was thought to. On petitioner's view, however, all those are cognizable constitutional claims.

Finally, petitioner argues that his position is supported by decisions such as *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), which held that broad political patronage rules violated the First Amendment. Petitioner points out that in these cases, the Court did not inquire whether each individual employee held a particular political viewpoint. Pet. Br. 20-21. But the Court has explained that there was a special reason for this, specific to the context of applying a general political affiliation test to all employees: "*Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation . . . . There is an advantage

in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by the government." *O'Hare Truck Service*, 518 U.S. at 719. These cases thus simply hold that such sweeping rules – like the mass firing petitioner hypothesizes, Pet. Br. 10 – are invalid because they undoubtedly violate the associational rights of numerous employees, and under the First Amendment, it is preferable not to require each individual one to prove his political associations. Critically, however, the Court did not deny that "it is inevitable that some case-by-case adjudication will be required even where political affiliation is the test the government has imposed," *id.* – for example, for an individual employee to receive damages.[7] And, in fact, this Court has rejected the indistinguishable argument that the breadth of those rulings makes it irrelevant whether the individual employee held a position that was susceptible of political hiring. *Id.*

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[7] Those decisions would control the case petitioner hypothesizes in which a public employer terminates an entire workplace. Petitioner notably does not allege that respondents applied any such sweeping patronage rule in this case or otherwise broadly sought to compel police officers to support the mayor in the election. The case accordingly does not present the question whether he would have a claim despite the fact that he had no relevant political association if he had been transferred pursuant to a policy that was unconstitutional as applied to other employees.

B. Petitioner's Policy Arguments Lack Merit.

1. Petitioner argues that his proposed rule is important prophylactically, so that public employees do not fear being disciplined on the basis of mistaken information. That argument could not justify a departure from the Constitution's text, historical understanding, and this Court's precedents. In particular, the Court has never suggested that prophylactic concerns could justify recognizing a claim on behalf of public employees who do not actually exercise any constitutional rights.

The public employment context is a particularly poor one in which to enact such prophylactic rules. The Court has repeatedly held that when the government acts as an employer rather than as a sovereign, it needs far *greater* leeway than the ordinary application of constitutional rules would afford.[8] On that basis, this Court has refused to find a First Amendment violation, for example, when the employee does not personally exercise any constitutional right, without regard to whether extension of such rights might give public employees greater confidence in their ability to engage in expression. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held that the Constitution does not restrict discipline arising from a public employee's

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[8] The question in this case, then, is not whether ordinary citizens are protected against government sovereign actions based on mistaken perceptions of a person's associations or political activities. This Court can decide that question in a future case in which it is properly presented.

speech in the course of his job responsibilities, rather than in his capacity in a citizen. In language that fully applies to this context, the United States argued that because "[c]onstitutional rights are personal," U.S. Br. 9, *Garcetti v. Ceballos*, *supra*, an employee speaking within the context of his job responsibilities has no First Amendment claim because he "has no First Amendment interest in his speech," *id.* 10. This Court agreed. "*So long as employees are speaking as citizens about matters of public concern*, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419 (emphasis added) (citations omitted).

Numerous other potential prophylactic rules might further First Amendment values. For example, the Court could recognize that even trivial disciplinary action or criticism violates the First Amendment if politically motivated. But instead, a claim arises only if the public employee is subject to a material adverse employment action. *See supra* 22. That is so because of the well-established, "'common-sense realization' that if every 'employment decision became a constitutional matter,' the Government could not function." *NASA v. Nelson*, 562 U.S. 134, 149 (2011) (quoting *Connick*, 461 U.S. at 143).

Petitioner's contrary policy arguments also rest on the unrealistic premise that such claims would always be asserted *accurately*. He ignores the inevitable disruption created by the many cases in which public employers are subject to false claims or fear they might be. This Court has already balanced the interests of public employees against the prospect that such claims could disrupt the orderly function of

governmental workforces. It has concluded that the balance is properly struck by limiting constitutional liability to cases in which the employee exercised or sought to exercise constitutional rights.

Further, petitioner's rule seeks to encourage acts of public employees that are not a concern of the First Amendment. He offers hypotheticals like the conservative employee who is afraid to drive a Toyota Prius for fear of being perceived as a liberal. Pet. Br. 26. The straightforward answer is that the Constitution was not adopted to encourage public employees to drive electric cars. That is the workaday concern of other civil service protections. And, of course, if an employee actually did drive a Prius as a form of political association, and was disciplined because of that Prius-based association, rejecting petitioner's rule would not destroy that (unlikely) claim insofar as driving a Prius is a form of protected expression (which, one hopes, it is probably not).

2. In any event, a prophylactic rule like the one petitioner proposes "is justified only by reference to its prophylactic purpose and applies only where its benefits outweigh its costs." *Maryland v. Shatzer*, 559 U.S. 98, 106 (2010) (citation and internal punctuation omitted).

Here, the harm his rule would cause is grossly disproportionate to any prophylactic benefit it would provide. The benefit of petitioner's prophylactic rule is modest at best. As discussed, this Court's precedents already protect a public employee who is disciplined based on a misunderstanding of the precise nature of the employee's speech or association. The question presented by this case

arises only when the employee does *not* engage in speech or association, but the employer mistakenly believes he has.

Petitioner argues that unless this Court recognizes a constitutional tort for such mistakes, the genuine exercise of First Amendment rights might be "chilled." Pet. Br. 26. But he provides no evidence of such a chilling effect, doubtless because employees frequently have *other* non-constitutional remedies for such mistreatment. Federalism works here. Employees like petitioner, who do not seek to engage in any First Amendment activity, are frequently protected by measures adopted through legislation and negotiation, such as widespread civil service rules and collective bargaining agreements. That is so because "the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment." *Waters*, 511 U.S. at 674 (plurality opinion) (citations omitted).

"The dictates of sound judgment are reinforced by the powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – available to those who seek to expose wrongdoing." *Garcetti*, 547 U.S. at 425 (collecting illustrative citations). Ordinary civil service protections are well designed to ensure that employees are not disciplined or terminated for erroneous or improper reasons, without turning every such allegation into a federal case. State law may provide further protections. New Jersey, for example, provides a state law cause of action for an "attempt" to violate an individual's civil rights under

the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 et seq. That claim arguably describes petitioner's allegations, which assert that respondents unsuccessfully sought to violate his rights. Petitioner for his own reasons did not assert such a claim in his complaint. But even when such remedies are unavailable, they will often not be necessary, because when an employer disciplines an employee in good standing based on mistaken information, it is likely to learn of the mistake and correct it.

Accordingly, it is no surprise that petitioner is unable to marshal any evidence of a pattern of public employers acting on the basis of a misunderstanding that employees have engaged in constitutionally protected speech or association. *Compare, e.g.*, U.S. Br. 20, *Lane v. Franks*, *supra* (describing the benefits of recognizing a First Amendment right to provide grand jury testimony, because "[t]he more than 1000 prosecutions for federal corruption offenses that are brought in a typical year often depend on evidence about activities that government officials undertook while in office" (citation omitted)).

At the same time, the costs of petitioner's prophylactic rule are enormous. The Constitution ordinarily leaves the government, like private employers, free to manage its workforce as it sees fit. "The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption. And, absent contractual, statutory, or constitutional restriction, the government is entitled to terminate them for no reason at all." *Umbehr*, 518 U.S. at 674.

This Court, in turn, has repeatedly warned against constitutionalizing the employee grievance process, and thereby disrespecting the prerogatives of state and local governments to manage their affairs and discouraging efforts to resolve such questions through the democratic process and labor negotiation. It has rejected rules like petitioner's, which "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight." *Garcetti*, 547 U.S. at 423. "To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Id.*

In sum, there is (of course) no evidence that public employers are seeking out and targeting for discipline the subset of employees like petitioner who are not politically neutral but instead agnostic. To the extent it occurs, ordinary civil service protections are sufficient. If not, they can be adjusted. And to the extent employers seek to discipline employees based on their political affiliations, petitioner's rule adds nothing because doing so accurately – which is presumably what employers are trying to do – is already fully protected by the Constitution.

3. The United States asserts that petitioner's rule is necessary to treat similarly situated employees equally. It gives as an example two employees who are terminated because they have invitations from the American Constitution Society on their desks. U.S. Br. 23. But if the second employee does *not* have any relevant political associations, then the two employees are not actually

similarly situated; the employee who has a claim is the one who was engaged in protected activity and is concerned that his employer retaliated against him, not the one who did not engage in any protected activity and is concerned that his employer is an idiot who cannot tell those with disfavored affiliations from those who get unsolicited mail.

In any event, the hypothetical actually illustrates the tumultuous effects that would arise from recognizing petitioner's claim. The United States avowedly contemplates that a public employee could bring claims on the exclusive basis that the employer believed he had political leanings based on something as innocuous as the return address on a letter on a desk, whether the employee had any relevant political affiliations or not. Everyone gets mail, drives a car, or provides some other indication that an employer could be alleged to have taken as an indication of political affiliation. Many employees who feel they have been wrongly treated will surmise that their employers have acted for some secret, invidious "reason." On the Government's view, any employee who links his disappointing treatment to the employer's awareness of any of these clues and potential miscues about political association has a basis to file a lawsuit and take discovery on the alleged motives for why they did not get what they sought from the government. The volume of litigation, and the extraordinary disruption to the orderly management of government workplaces that would result, is obvious. By contrast, if the employee must at least prove that they were actually engaged in protected activity and that there is some factual theory connecting that activity to the government's

action, then at least some of the least plausible claims can be weeded out at the outset.

IV. If This Court's Existing Precedents Compel Recognition of Petitioner's Claim, They Should Be Overruled.

If despite the foregoing, this Court were to conclude that petitioner's rule is compelled by its prior decisions in the public employment retaliation line of cases, then those decisions should be overruled.

Prior to *Elrod*, there was no doubt regarding the constitutionality of political patronage – *i.e.*, making personnel decisions based on political affiliation, a practice that is "as old as the Republic" itself, which has "contributed significantly to the democratization of American politics." *Elrod*, 427 U.S. at 376 (Powell, J., dissenting). In *Elrod*, a plurality of this Court upended that settled understanding, and the result has been a "shambles": an unworkable hodge-podge of rules and tests that have left both employers and employees "utterly in the dark" about their rights and obligations, thus breeding unnecessary litigation – and provoking forceful dissents – every time the Court extends *Elrod* to a new context. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 111-12 (1990) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J., and O'Connor, J., in part). Petitioner's rule, which would substantially expand the right recognized in those cases to public employees and contractors who do not even engage in constitutionally protected activity, would for the reasons given above depart even further from the Constitution's text and history and would impose still

greater burdens on government agencies. "The doctrine of stare decisis allows us to revisit an earlier decision where experience with its application reveals that it is unworkable." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). If they extend so far as petitioner suggests, *Elrod* and its progeny should be overruled because they impose rigid and unworkable constitutional rules on employment decisions that are properly regulated by statute and ordinance.

Elrod principally justified the decision to abandon more than a century of consistent practice by deciding that political patronage is so obnoxious that the federal courts should recognize a First Amendment right on behalf of employees who exercise their rights of political association. That is a non sequitur because even if patronage is a bad way to make employment decisions, that does not mean that it violates the First Amendment. The contrary argument, that patronage decisions impose unconstitutional conditions on government employment, fails to account for the government's need for autonomy in making employment decisions – a need this Court has acknowledged at least since *Pickering*, 391 U.S. at 568, and recently re-emphasized in *Garcetti*, 547 U.S. at 420. A view grounded in historic tradition, understanding that patronage has always been part of American political life and public employment, far better accounts for that pressing state interest.

Moreover, the strident criticism of the patronage system is misplaced. While *abuse* of patronage undermines good governance, there are important respects in which patronage has been – and can be – valuable and appropriate. Patronage creates

incentives for political participation, and also helps to produce cohesive and effective political parties, thus furthering First Amendment values. *See Elrod*, 427 U.S. at 385 (Powell, J. dissenting). Patronage makes it more likely that public employees will be accountable to voters, and therefore likely to implement democratically favored policies. And patronage can also make it more likely that employees will be committed to their superiors and their workplaces, thus improving the efficiency of government.

Indeed, *Elrod* and *Branti* themselves acknowledged the benefits of patronage when they permitted patronage-based decisions vis-à-vis policymaking and confidential employees for whom political affiliation is a job requirement. But that rule is unworkable because courts cannot reliably distinguish "good" patronage from "bad," and so the same job is sometimes deemed political, and other times not, based on the sensibilities of the judge considering the issue or idiosyncratic facts. *See Rutan*, 497 U.S. at 111-12 (Scalia, J., dissenting) (documenting multiple illustrative examples of ambiguous positions, including deputy sheriffs, attorneys, clerks, bailiffs, and other public employees). The problem is especially pronounced in the early stages of federal civil rights litigation, where a plaintiff's allegations are the only information available to the court, and so the result may turn on a plaintiff's skill in pleading – even if the facts alleged are false. *See Umbehr*, 518 U.S. at 710 (Scalia, J., dissenting).

Elrod and *Branti* also impose substantial unnecessary litigation risk on government agencies.

These cases raise the specter of federal constitutional litigation any time a public employer makes an adverse employment or contracting decision. Agencies may thus hesitate before making decisions that are in the public interest. And once they do make the decision, former employees or losing contractors – who have little to lose – have every incentive to litigate, even if their sole goal is to coax a settlement out of the government. If petitioner prevails, the problem will only get worse because a plaintiff only needs to allege an unlawful motivation – and not that he actually has any meaningful political affiliation. Applying petitioner's motivation-based version of *Elrod* and *Branti* thus risks miring public agencies in unnecessary litigation as they attempt to conduct their everyday affairs.

Elrod and *Branti* are not only unworkable, but also unnecessary because there is an obvious alternative to constitutionalizing public employment decisions. Legislatures at the federal, state, and municipal levels have enacted protections for civil servants, and public sector unions have in many cases bargained for enhanced protections for their members. If *Elrod* and its progeny are overruled today, many employees will not notice any difference because they already have statutory protections. To the extent additional protections are appropriate, lawmakers have all the power they need to enact those rules. These legislative solutions can be tailored to address the circumstances in which patronage poses a threat to good governance, while preserving the pre-*Elrod* status quo in situations in which patronage may be helpful or necessary. *See Rutan*, 497 U.S. at 94 (Scalia, J., dissenting). There is

nothing constitutionally offensive about leaving such political questions to the people.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, MAYOR JOSE TORRES, and POLICE CHIEF JAMES WITTIG,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Public employees have a First Amendment right not to be demoted on patronage grounds. It has long been recognized that employees can be punished neither for engaging in politics nor for *not* engaging in politics. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347 (1976). In the decision below, the Third Circuit took this protection away from employees who are not engaged in politics but whose employers think they are.

In defending the Third Circuit's bizarre departure from settled law, respondents make three principal claims, all of which are incorrect.

First, respondents argue (Resp. Br. 8-24, 31-38) that in order to be protected by the First Amendment against patronage demotions, a government employee must be engaged in political activity. This is the same mistake the Third Circuit made below. The First Amendment bars a government supervisor from demoting an employee for the purpose of suppressing political affiliation, whether or not the employee works on a campaign or takes a political position. Under this Court's precedents, it makes no difference whether an employee is politically active or utterly uninterested in politics. All public employees are equally protected against politically vindictive supervisors.

Second, respondents profess (Resp. Br. 24-31) to fear a flood of frivolous lawsuits from disappointed public employees. Until the decision below, however, every circuit that addressed the question recognized that the First Amendment protects politically inac-

tive public employees from politically motivated employment decisions made by supervisors who incorrectly perceive the employees as political opponents. These circuits have not seen any flood of frivolous lawsuits. The United States—the largest public employer in the country by a wide margin—does not fear a flood of frivolous lawsuits. Nor should it, because trial courts can weed out implausible claims at the pleading stage in this area of law just like in any other.

Third, respondents claim (Resp. Br. 39-46) that it would be poor "policy" for the First Amendment to protect employees like Jeffrey Heffernan who have not taken political positions. To the extent policy concerns will inform the Court's decision, however, they point entirely against respondents' view. In the decision below, the Third Circuit drastically curtailed the First Amendment rights of public employees, and protected the ability of government supervisors to make kneejerk, factually erroneous, politically vindictive employment decisions. If this case presents an occasion for balancing these two interests, the balance is not even close.

I. The First Amendment bars a public employer from demoting an employee for the purpose of suppressing political affiliation, regardless of whether the employee is politically active.

Respondents contend that a public employee must have a "protected affiliation" (Resp. Br. 15) before the First Amendment will bar the government from

punishing him on political grounds. In respondents' view, the First Amendment protects Democrats, Republicans, and avowed independents (*id.* at 15-16), but it does not protect a "politically agnostic" (*id.* at 9 n.1) employee who has not espoused a political position or engaged in political activity. Respondents believe that politically-motivated employment decisions are unlawful only if the employee has "engaged in ... activity protected by the First Amendment" (*id.* at 13) or "[i]f the employee has a political association" (*id.* at 16).

The Court's precedents are to the contrary. The First Amendment protects all public employees from politically-motivated demotion, including those who have not declared any political position or engaged in any political activity.

"The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, *or to not believe and not associate*." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990) (emphasis added). For this reason, in its cases involving the First Amendment rights of public employees, the Court has never distinguished between employees with political affiliations and those without. Both sets of employees are protected against politically-motivated demotions.

For example, the *Rutan* plaintiffs had not engaged in any political activity. Their supervisors nevertheless violated the First Amendment by denying them promotions because they "did not have the support of the local Republican Party." *Id.* at 67. On respond-

ents' view, the *Rutan* plaintiffs should have prevailed only if they were avowed Democrats or independents, but not if they were agnostic or politically inactive, because in the latter case they would not have engaged "in any activity protected by the First Amendment" (Resp. Br. 8). The Court did not make the distinction respondents think is so important. Instead, the Court recognized that the First Amendment protects politically inactive employees just as much as the politically active.

Likewise, *Elrod*, 427 U.S. at 349 (plurality opinion), characterized the question presented as involving whether the First Amendment protects public employees from being discharged "because of their partisan political affiliation *or nonaffiliation*" (emphasis added). The *Elrod* plaintiffs had not engaged in any political activity. Yet their supervisor violated the First Amendment by firing them for not being members of the Democratic Party. *Id.* at 351, 373. Again, the Court did not inquire into whether they were Republican, independent, or agnostic, because employees who do not affiliate politically are protected just as much as those who do.[1]

Respondents' proposed distinction between the independent and the agnostic would make little sense.

---

[1] Respondents err in contending (Resp. Br. 5) that "if the chief of police *correctly* understood that petitioner was not a supporter of the mayor's opponent, he could constitutionally transfer him for any reason or none at all." Under *Rutan* and *Elrod*, the chief of police could not constitutionally demote Heffernan for the purpose of suppressing political affiliation, even if the chief correctly understood that Heffernan did not support the mayor's opponent.

The harm in political patronage consists of the "restraint it places on freedoms of belief and association." *Id.* at 355. Employees fired for not adopting the boss's preferred political position will feel that restraint just as keenly whether they are independent or agnostic. If a newly elected mayor were to fire all municipal employees and replace them with contributors to his campaign, politically inactive employees would suffer just as much as the politically active.

Given that even an employee with no political involvement whatsoever is protected by the First Amendment, the present case is an easy one, because Jeffrey Heffernan was hardly agnostic about the mayoral election. He was as close to a political campaign as one could be without actually campaigning. He had been friends with Spagnola, the candidate, for decades. Pet. App. 2a-3a. He wanted Spagnola to win. Pet. App. 3a. His mother was a Spagnola supporter. Pet. App. 3a. Heffernan knew many of the people involved in the Spagnola campaign, because Spagnola was a former police chief. Pet. App. 2a. Heffernan went to the location where Spagnola campaign workers were giving out signs. Pet. App. 3a. He chatted with Spagnola's campaign manager, while holding a Spagnola campaign sign. Pet. App. 3a, 16a. He drove the sign to his mother's house, so she could plant it in her yard. Pet. App. 3a. For these activities, respondents demoted him. Even if respondents were correct that an employee must engage in political activity before the First Amendment will protect him, Heffernan would win this case, because he engaged in the quintessential polit-

ical activities of attending a campaign gathering and picking up a campaign sign.

Respondents discuss at length (Resp. Br. 16-24) the various factors that are balanced in the cases involving punishment of an employee for his *speech*, but this case is about political patronage, not about speech. Indeed, this case *could* not be about speech, because the District Court found that Heffernan did not engage in speech. Pet. App. 25a-27a. The speech cases and the patronage cases are governed by completely different doctrinal frameworks. Unlike punishment motivated by political patronage, which is unlawful full stop, punishment based on an employee's speech is governed by a test that requires the balancing of several factors. *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996). Respondents' discussion of these factors is beside the point in the present case, where there are no factors to be balanced.

Respondents also misunderstand *Waters v. Churchill*, 511 U.S. 661 (1994). The plurality's statement in *Waters* that "[w]e have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information," *id.* at 679, refers to the Due Process Clause, not, as respondents would have it (Resp. Br. 33-34 & n.5), to the First Amendment. The very next sentence explains that due process protects employees only by giving them "a right to adequate procedure," not a right to factually correct outcomes. *Waters*, 511 U.S. at 679. Contrary to respondents' view, this paragraph of *Waters* does not stand for the remarkable proposition that a public

employer can escape the First Amendment simply by committing a factual mistake.

Thus in *Branti v. Finkel*, 445 U.S. 507 (1980), the Court held that a public employer violated the First Amendment by firing employees "solely because they were Republicans," *id.* at 508, even though one of the fired employees was actually a Democrat, *id.* at 509 n.4. The Court applied the First Amendment standard to the employer's perception of the employee's political affiliation, not to the employee's actual political affiliation. Because the employer "regarded him as a Republican," *id.*, and fired him on that ground, the employer violated the First Amendment.

Political patronage is thus an unconstitutional reason for demoting a public employee, whether or not the employee engages in politics, and whether or not the employer correctly perceives the employee's political affiliation. The fact that Jeffrey Heffernan was not campaigning for Spagnola does not deprive him of the First Amendment's protection against being demoted on patronage grounds.

II. This has been the law for many years without provoking the flood of frivolous lawsuits respondents profess to fear.

Respondents profess (Resp. Br. 24-31) to worry that governments will be overrun with frivolous litigation if the First Amendment protects the politically inactive. This fear is unfounded.

Until the decision below, every circuit that addressed the question had recognized that politically

inactive public employees are protected by the First Amendment from politically motivated employment decisions made by supervisors who incorrectly perceive the employees as political opponents. *See Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008) ("Whether Welch actually affiliated himself with the anti-recall camp is not dispositive since the pro-recall camp attributed to him that affiliation."); *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 300 (6th Cir. 2012) ("we adopt the reasoning of the First and Tenth Circuits and hold that retaliation based on perceived political affiliation is actionable under the political-affiliation retaliation doctrine"); *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008) ("our only relevant consideration is the impetus for the elected official's employment decision"). These circuits were not concerned about a litigation explosion. They have not been flooded with frivolous lawsuits filed by disappointed public employees.

Moreover, for many years the lower courts have recognized mistaken-perception claims under Title VII, the Americans with Disabilities Act, the Fair Labor Standards Act, and the Age Discrimination in Employment Act. Pet. Br. 24 n.1; U.S. Br. 28-32. The sky has not fallen. Respondents' professed fear of too much litigation is also irreconcilable with another of respondents' assertions (Resp. Br. 42-43)—that state law provides ample protection for employees who are mistreated the way Heffernan was. The sky has not fallen in state court either.

If respondents' fears had any substance, the government that would be forced to defend the biggest share of all these frivolous lawsuits would be the

United States, which is the largest public employer in the nation by a considerable margin. Yet the United States does not fear a flood of frivolous lawsuits. U.S. Br. 25-26 n.5. As the United States correctly observes, trial courts can dismiss frivolous suits at the pleading stage in this area of law just like in any other.

Respondents' parade of horribles is based on a mistaken premise—that if the First Amendment protects politically inactive employees against patronage demotions, it would become possible for any plaintiff to get to trial simply by asserting that the defendant had a mistaken belief about the facts underlying some aspect of his case. This premise is incorrect. Unlike respondents' hypotheticals, the present case involves clear, undisputed evidence that a public employee was demoted for holding a campaign sign, at a campaign event, while speaking with a campaign manager. Indeed, this case is a singularly poor one in which to raise the specter of frivolous lawsuits, because Heffernan *won* this case before a jury, only to have the verdict vacated when the trial judge retroactively recused himself. Pet. App. 4a.

The hypotheticals conjured by respondents are quite different. They involve flimsy, implausible allegations that would never survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). For example, respondents imagine (Resp. Br. 26) a case in which unsuccessful applicants for a detective position claim that "respondents mistakenly thought that they too were supporters of the mayor's opponent." But such "naked assertions devoid of further

factual enhancement" are insufficient to get past a motion to dismiss. *Iqbal*, 556 U.S. at 678 (citation, brackets, and internal quotation marks omitted). Rather, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Respondents' hypotheticals fall well short of this standard. For many years trial courts have been dismissing implausible complaints in public employment cases. Respondents offer no reason to doubt trial courts' continued ability to do so.

Respondents and their amici also err in asserting that New Jersey law offers additional remedies that Heffernan could have utilized. The New Jersey Civil Rights Act, N.J. Stat. § 10:6-2 (Resp. Br. 42-43, NCSL Br. 20)) does not create substantive rights but is simply the state analogue to 42 U.S.C. § 1983. Both statutes provide a cause of action for the violation of constitutional rights, so the Question Presented in this case would be the same under either statute. The New Jersey Civil Service Act, N.J. Stat. § 11A:1-1 *et seq.* (NJSLM Br. 5-11), prohibits reprisals for an employee's "political activities or affiliations," N.J. Admin. Code § 4A:2-5.1(b) (applied to civil service employers by *id.* § 4A:1-1.2), the very things respondents insist are a requirement for First Amendment protection as well. Finally, amici make the astonishing suggestion (NJSLM Br. 13-14; NCLS Br. 8-17) that constitutional protections should melt away when state law allows employees to negotiate analogous protections through collective bargaining. The notion that unionized employees have fewer constitutional rights than non-unionized employees

is contrary not just to common sense but to the Court's public employment cases, which make no such distinction. *See, e.g.*, *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (applying the ordinary First Amendment standard in a case involving unionized employees). In any event, a state could not weaken the First Amendment by providing parallel statutory protection, so it makes no difference whether New Jersey law would also offer relief.

III. The Third Circuit's idiosyncratic view drastically curtails the First Amendment rights of government employees and allows employers to make kneejerk, politically vindictive employment decisions.

Respondents suggest (Resp. Br. 41-42) that the benefits of the Third Circuit's new rule exceed its harms. But this calculation is based on a misapprehension of both sides of the balance.

On one side, the Third Circuit's view allows a government supervisor to make kneejerk, factually erroneous, politically vindictive employment decisions, like the one respondents made in this case. The Third Circuit's idiosyncratic rule incentivizes supervisors to make baseless accusations about their employees, and then rewards them for being wrong. Under the Third Circuit's view, the most irresponsible employers gain a power that is denied to all other employers.

On the other side of the balance, the Third Circuit's view drastically curtails the First Amendment rights of government employees. If the Third Circuit is correct, any public employee could constitutionally be fired if her boss wrongly perceives insufficient political support. Public employees would have to walk on eggshells every day at the workplace, for fear of leaving the boss with the wrong impression. Anything an employee says or does could be a ground for dismissal.

As we explained in our opening brief (at 27-28), public employees such as police officers and teachers are routinely asked to contribute to their supervisors' campaigns. In all circuits but the Third, employees can decline these requests without fear of losing their jobs, because the First Amendment protects them from retaliation whether or not they are politically active, and whether or not they support their supervisors' opponents. Not so in the Third Circuit, where declining to contribute is now a perilous option, because it may lead the boss to suspect, even incorrectly, that an employee is a political opponent.

The Third Circuit's new rule thus benefits the worst government supervisors, while it harms millions of public employees. There is no reason to depart from the Court's traditional view that the First Amendment protects all government employees, regardless of whether they participate in political campaigns.

IV. Respondents have waived the arguments that the police chief had a neutral policy banning all partisan activity and that political loyalty was an appropriate requirement for Heffernan's job.

Amici raise two arguments that should not be addressed because they have been waived by respondents and because they are not encompassed within the Question Presented.

First, the United States suggests (U.S. Br. 27-28) that on remand the District Court may need to determine whether Heffernan was demoted pursuant to a neutral policy barring all partisan political activities. Respondents, however, have never argued that Heffernan's demotion was lawful on this ground. While Police Chief Wittig did claim in a deposition to have an unwritten policy to that effect, no one else in the office had ever heard of such a policy before this suit was brought. Perhaps for this reason, respondents did not attempt in their motion for summary judgment to justify Wittig's demotion of Heffernan on the basis of this ostensible policy. Nor did respondents make this argument before the Third Circuit. Nor did they make this argument in their opposition to certiorari. Nor do they make it in their brief. The Court should therefore not address whether this issue remains open for the District Court to resolve.

Second, amici National Conference of State Legislatures et al. suggest (NCSL Br. 32-39) that political loyalty was an appropriate requirement for Heffer-

nan's job as a police officer. This too is an argument that respondents have never made at any stage of this litigation—neither in the District Court, nor in the Third Circuit, nor in opposing certiorari, nor in their brief. In the decision below, the Third Circuit correctly noted that this issue is not present in this case. Pet. App. 6a n.1. Such an argument would not succeed on the merits in any event. *See Fuerst v. Clarke*, 454 F.3d 770, 773 (7th Cir. 2006) (Posner, J.) ("The sergeants in the Milwaukee County Sheriff's Department are not policymaking officials" under *Branti* and *Elrod*); *Stephens v. Kerrigan*, 122 F.3d 171, 176 (3d Cir. 1997) ("the positions of [police] sergeant and lieutenant do not require a political affiliation"). Amici place great stress on Heffernan's access to "confidential information," NCSL Br. 37, but all police officers have access to confidential information. That does not entitle the police chief to require loyalty to the mayor as a condition for retaining one's job as a police officer.

Because respondents did not properly raise either of these grounds below or in this Court, they may not defend the Court of Appeals' judgment on these grounds. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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No. 14-1280

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v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment bars the government from demoting a public employee based on a supervisor's erroneous perception that the employee supports a political candidate.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether the First Amendment bars a public employer from demoting an employee based on the mistaken perception that he had supported a particular candidate for office. The United States is the Nation's largest public employer, employing 2.7 million people who constitute approximately 12.6% of all federal, state, and local government employees. See U.S. Census Bureau, *Annual Survey of Public Employment & Payroll Summary Report: 2013*, at 2, 7 (Dec. 2014). The United States therefore has a substantial interest in the constitutional standards governing when a public employee may be disciplined based on the government's perception of his political affiliation. In addition, the United States is responsible for enforcing federal labor and employment statutes that prohibit employment discrimination and retaliation, including

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* Similar mistake-of-fact situations may arise in cases brought under those statutes.

STATEMENT

1. In 2005, petitioner, a detective in the Paterson, New Jersey, Police Department, was assigned to work in the office of the Chief of Police, respondent James Wittig. Pet. App. 2a. In 2006, petitioner's bedridden mother asked him to obtain a lawn sign supporting Lawrence Spagnola, a former Paterson police chief who was running for mayor of Paterson against the incumbent, respondent Jose Torres. Because petitioner did not reside in Paterson, he was ineligible to vote in the election, and he was not involved in Spagnola's campaign. *Id.* at 2a-3a, 15a-16a.

Another Paterson police officer assigned to Mayor Torres's security staff observed petitioner speaking to Spagnola's campaign manager when petitioner visited a distribution point to obtain the sign. Pet. App. 3a, 15a-16a. That officer told Chief Wittig that petitioner "was out hanging political signs in the second ward." *Id.* at 16a (citation omitted). The next day, one of petitioner's supervisors confronted him about his interaction with Spagnola's staff. *Id.* at 16a-17a. Petitioner was then transferred out of Chief Wittig's office and "demoted to walking patrol" based on his "political involvement with Spagnola." *Id.* at 3a, 16a-17a. Wittig later testified that petitioner had "breached his trust" and violated office policy by being "overtly involved in the political campaign." *Id.* at 17a (citation omitted).

2. In 2006, petitioner filed this action under 42 U.S.C. 1983, alleging in relevant part that respondents (Mayor Torres, Chief Wittig, and the City of Paterson) violated his First Amendment rights by demoting him based on their erroneous belief that he supported Spagnola's mayoral campaign. Pet. App. 3a-4a.

a. In 2009, a jury found that respondents Torres and Wittig had infringed petitioner's freedom of association. Pet. App. 4a. After trial, however, the district judge recused himself based on a conflict of interest, vacated the jury's verdict, and transferred the case to a different judge. *Id.* at 4a, 18a-19a.

The district judge to whom the case was reassigned granted summary judgment for respondents. Pet. App. 66a-71a. The court ruled that petitioner's free-speech claim failed because petitioner had not engaged in any protected speech, but it did not address petitioner's free-association claim. *Id.* at 70a. Petitioner appealed, and the court of appeals reversed and remanded on procedural grounds. *Id.* at 57a-65a. The court held that the district court had erred by denying petitioner an opportunity to oppose respondents' motions for summary judgment, by refusing to consider evidence presented during the 2009 trial, and by failing to address petitioner's free-association claim. *Id.* at 59a-65a.

b. On remand, a third district judge granted summary judgment for respondents. Pet. App. 14a-54a. As relevant here, the court rejected petitioner's claim that respondents violated his First Amendment association rights by "demot[ing] him because they mistakenly believed that his actions betokened an affiliation with the Spagnola political organization." *Id.* at 45a. Canvassing the trial record, the court concluded

that in picking up the political sign for his mother, petitioner had not actually intended to engage in political activity or associate with Spagnola's campaign. *Id.* at 44a-45a. In the absence of "First Amendment conduct," the court reasoned, petitioner could not establish that respondents had retaliated on the basis of his engagement in protected activity. *Id.* at 46a.

3. The court of appeals affirmed. Pet. App. 1a-13a. In relevant part, the court held that the district court had correctly rejected petitioner's "perceived-support" theory that respondents retaliated against him based on their mistaken belief that he was involved in Spagnola's campaign. *Id.* at 11a-13a. The court viewed that claim as foreclosed by Third Circuit precedent holding that "a free-speech retaliation claim is actionable under [Section] 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights." *Id.* at 11a (citing *Ambrose* v. *Township of Robinson*, 303 F.3d 488, 496 (2002)). The court found "no convincing reason" to distinguish between the free-speech claim at issue in *Ambrose* and petitioner's free-association claim. *Ibid.* The court concluded that petitioner argued only that he was demoted "on a factually incorrect basis," rather than for any protected conduct, and that "it is not 'a violation of the Constitution for a government employer to [discipline] an employee based upon substantively incorrect information.'" *Id.* at 13a (brackets in original) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 679 (1994) (plurality opinion)).

SUMMARY OF ARGUMENT

A public employer violates the First Amendment when it takes action against an employee for associat-

ing with a disfavored political party, unless party affiliation is a reasonable requirement for the position in question. See, *e.g.*, *Branti* v. *Finkel*, 445 U.S. 507, 514-515 (1980). A public employer acts equally unconstitutionally when it acts against the employee based on the mistaken belief that he has engaged in disfavored political activity. The employer that is both politically motivated and willing to act on unsubstantiated, ultimately incorrect suspicions should not be given a free pass to act with the purpose of suppressing its employees' political beliefs.

I. The Court's decisions on government limitations on public employees' political activity establish that the touchstone of the First Amendment inquiry is the government's motive. A public employer has considerable discretion to enforce neutral restrictions on partisan activity that are designed to ensure efficiency, *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564-566 (1973), and it likewise has leeway to impose a political-affiliation requirement when affiliation "is an appropriate requirement for the effective performance of the public office involved," *Branti*, 445 U.S. at 518. By contrast, when a public employer takes action against an employee for the purpose of suppressing his beliefs or association in the absence of those justifications, it violates that employee's right to freedom of association and, more broadly, chills all employees' exercise of their rights of association. *Id.* at 515-517.

Accordingly, a public employee may establish that his employer's action against him violated the First Amendment by "prov[ing] that [he was] discharged 'solely for the reason that [he was] not affiliated with or sponsored by the [government's chosen] [p]arty.'"

Branti, 445 U.S. at 517 (citation omitted). The employee need not show that the government's action was taken in response to any affirmative exercise of First Amendment rights, or that his rights of belief and association were actually chilled or coerced.

The employer's unconstitutional motive is no different when the employer acts on the basis of a mistaken perception of the employee's beliefs. "Motive and knowledge are separate concepts," *Equal Emp't Opportunity Comm'n* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015), and an employer's mistake of fact does not vitiate its purpose of suppressing disfavored beliefs. In the context of a mistake running the other way—where the employer mistakenly believed that an employee had made statements for which she could constitutionally be fired—the Court has held that the constitutionality of the employer's action should be judged based on the facts as it perceived them. See *Waters* v. *Churchill*, 511 U.S. 661 (1994). The same analysis should apply here.

There is no justification for treating a public employer's attempt to suppress disfavored beliefs and association differently when the employer happens to be wrong about the employee's beliefs. Whether or not the employer is factually mistaken, its action violates the employee's First Amendment right not to be penalized for the purpose of suppressing his beliefs. And the chilling effect on all employees is no less severe when the employer is mistaken.

The court of appeals' contrary view would lead to anomalous results. The employer that proceeds based on unsubstantiated doubts about an employee's political loyalty—and turns out to be wrong—would be free

to take action against employees for the purpose of suppressing political association. An employee's ability to challenge the employer's action would turn on happenstance—whether the employer's inferences about his beliefs are correct. And courts would have to engage in intrusive inquiries into the substance of plaintiffs' beliefs in order to determine whether their claims were meritorious.

II. Similar mistaken-perception issues arise in the context of federal statutes that protect public and private employees from discrimination and retaliation. Whether an employer may be liable under a particular statute for discriminating or retaliating based on a mistaken perception of the employee's status or actions turns on the proper construction of the statute in question. As a result, the Court's decision in this case will not resolve—and the Court should not seek to resolve—similar questions arising in the federal statutory context.

ARGUMENT

I. A PUBLIC EMPLOYER VIOLATES THE FIRST AMENDMENT WHEN, ABSENT JUSTIFICATION, IT ACTS AGAINST AN EMPLOYEE WITH THE PURPOSE OF SUPPRESSING DISFAVORED POLITICAL BELIEFS, EVEN IF THE EMPLOYER'S PERCEPTION OF THOSE BELIEFS IS MISTAKEN

"[E]ven though the government may deny" an individual public employment "for any number of reasons, there are some reasons upon which the government may not rely." *Branti* v. *Finkel*, 445 U.S. 507, 514-515 (1980) (quoting *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). In particular, a public employer generally violates the First Amendment when it takes action against an employee in order to suppress disfa-

vored political activity or enforce a "state-selected orthodoxy." *Rutan* v. *Republican Party*, 497 U.S. 62, 75 (1990); see *Elrod* v. *Burns*, 427 U.S. 347, 351 (1976) (plurality opinion). When a public employer acts with that impermissible motive, it violates the targeted employee's First Amendment right to be free from such coercion, and it chills the First Amendment activities of other public employees.

An employer who takes action against an employee for the purpose of suppressing political beliefs should not be absolved of liability under the First Amendment simply because it happens to be mistaken about the employee's political affiliation. That mistake of fact does not vitiate the employer's unconstitutional motive or the resulting chilling effect. The court of appeals' contrary decision should therefore be vacated and the case remanded for further proceedings.

A. The First Amendment Generally Prohibits A Public Employer From Acting Against An Employee With The Purpose Of Suppressing Disfavored Political Beliefs Or Association

1. A public employer may place neutral restrictions on all partisan activity but generally may not condition employment on political affiliation

a. The government has considerable leeway under the First Amendment to regulate its employees' partisan activity when it seeks to impose neutral limits that do not attempt "to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls." *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973) (*Letter Carriers*). The Hatch Political Activity Act (Hatch Act), 5 U.S.C. 7321 *et seq.*, which limits parti-

san activities by federal employees, is an example of such a neutral regulation.

The Court has twice upheld a prior provision of the Hatch Act that prohibited all federal employees from taking any active part in political management or in political campaigns. See *United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 82-83 (1947); *Letter Carriers*, 413 U.S. at 564-567. The Court emphasized that the prohibition was "not aimed at particular parties, groups, or points of view," *Letter Carriers*, 413 U.S. at 564, but was instead designed to promote government efficiency and integrity. In particular, the Court observed, the provision was intended to ensure that "[g]overnment employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." *Id.* at 566. Accordingly, the government generally may condition public employment on compliance with even-handed rules limiting partisan activity, so long as they reflect a reasonable balance between the government's efficiency interests and the employees' interests in participating in "matters of public concern." *Id.* at 564 (citation omitted); see *Mitchell*, 330 U.S. at 101.

b. A public employer also has leeway to make party affiliation a condition of public employment when a particular affiliation "is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. When "an employee's private political beliefs would interfere with the discharge of his public duties," as is the case with many policymaking jobs, "his First Amendment rights may be required to yield to the State's vital interest in

maintaining governmental effectiveness and efficiency." *Id.* at 517. In such cases, the government may condition employment on party affiliation because that condition "has some justification beyond dislike of the individual's political association." *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S 712, 721 (1996).

Absent such a justification, however, the government generally may not "make public employment subject to the express condition of political beliefs or prescribed expression." *O'Hare*, 518 U.S at 717; *Rutan*, 497 U.S. at 71; *Branti*, 445 U.S. at 516; *Elrod*, 427 U.S. at 358-359. For instance, an incoming County Sheriff may not maintain a "practice" of replacing "employees of the Sheriff's Office with members of his own party when the existing employees lack or fail to obtain requisite support from" the new Sheriff's political party. *Elrod*, 427 U.S. at 351; see *Branti*, 445 U.S. at 510. And without the requisite justification, a state employer may not deny promotions and transfers because the employees "did not have the support of Republican Party officials." *Rutan*, 497 U.S. at 67.

This Court has concluded that such patronage practices offend the First Amendment because the government is acting with the purpose of "deny[ing] a benefit to a person because of his constitutionally protected speech or associations." *Branti*, 445 U.S. at 515 (citation omitted). "[C]onditioning public employment on the provision of support for the favored political party 'unquestionably inhibits protected belief and association.'" *Rutan*, 497 U.S. at 69 (quoting *Elrod*, 427 U.S. at 359). The "knowledge that one must have a sponsor in the dominant party in order to retain one's job" necessarily inhibits employees—and potential employees—from expressing their own be-

liefs and supporting the political parties or causes of their choice. *Branti*, 445 U.S. at 516; see *Elrod*, 427 U.S. at 356 (noting that patronage practices "deter[]" both "[e]xisting employees" and "the multitude seeking jobs" from supporting "competing political interests"); *Rutan*, 497 U.S. at 72. Employees will also feel pressure to "compromise" their "true beliefs" by professing to support the employer's chosen party or position. *Elrod*, 427 U.S. at 355.

2. The Court's partisan-affiliation decisions establish that the government violates the First Amendment when it acts against an employee with the purpose of suppressing belief and association

The touchstone of the First Amendment inquiry in the *Elrod* line of cases is the government's motive. When the government acts with the purpose of suppressing disfavored political association, absent the justifications discussed above, it violates the First Amendment. Accordingly, "[t]o prevail in this type of an action, it [i]s sufficient" for the plaintiff "to prove that [he was] discharged 'solely for the reason that [he was] not affiliated with or sponsored by the [favored] [p]arty.'" *Branti*, 445 U.S. at 517 (citation omitted). That characterization of the elements of an *Elrod* claim establishes that a public employee's right to freedom of association is violated when his employer acts against him with the purpose of suppressing his beliefs or association. No more is required.

Two aspects of the Court's decisions underscore that conclusion. First, the Court has approved *Elrod* claims that are not premised on any affirmative exercise of First Amendment rights. The Court has emphasized that a public employer acts with the requisite improper motive when it takes action against an em-

ployee because he *lacks* the support or sponsorship of a particular party. See *Branti*, 445 U.S. at 516; *Elrod*, 427 U.S. at 351 (government violates First Amendment when it dismisses employees because they "lack or fail to obtain requisite support from" the favored party). There could be any number of reasons an employee lacks the support of the favored party. He might have affirmatively affiliated himself with an opposing party, or he might have affirmatively refused to seek the support of the favored party. Or his lack of in-party support might be the result of political apathy rather than any intentional exercise of First Amendment rights. The Court has not distinguished among such plaintiffs. See *Rutan*, 497 U.S. at 67 (observing that some of the plaintiffs alleged that they were denied benefits because they "did not have the support of the local Republican Party," without inquiring into the reasons for the lack of support).

Nor would such distinctions be justified: surely an incoming mayor's preemptive firing of all employees who did not support his campaign is no less wrongful with respect to those employees who were simply politically inactive. And even when an employee has not affirmatively exercised any First Amendment right before being fired for his lack of political support, the chilling effect on other employees "necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." *Branti*, 445 U.S. at 516.

Second, the employee also need not show that but for the unconstitutional condition imposed by the employer, he *would have* exercised his First Amendment rights. There is "no requirement that dismissed employees prove that they, or other employees, have

been coerced into changing, either actually or ostensibly, their political allegiance." *Branti*, 445 U.S. at 517. In other words, the plaintiff need not demonstrate that he was chilled in his beliefs or association. Indeed, the Court has acknowledged that for some public employees, the threat of losing one's job might be "ineffective to coerce them to abandon political activities," but it has declined to engage in any case-by-case inquiry into chilling effect. *O'Hare*, 518 U.S. at 723. The Court explained that questions about the precise degree of chill suffered by a particular plaintiff are irrelevant in light of "a more fundamental concern": "public employees[] are entitled to protest wrongful government interference with their rights of speech and association." *Ibid.*; see *Rutan*, 497 U.S. at 69 ("conditioning public employment on the provision of support for the favored political party 'unquestionably inhibits protected belief and association'") (quoting *Elrod*, 427 U.S. at 359). That interference occurs when the government takes action against the employee for the purpose of suppressing belief and association. See *Branti*, 445 U.S. at 517.

B. When A Public Employer Acts On The Basis Of An Employee's Perceived Political Association, It Should Not Be Absolved Of Potential Liability Simply Because Its Perception Was Inaccurate

The question presented in this case is whether, when the government acts against an employee on the basis of his perceived political association, the fact that the employee did not actually engage in associational activities should prevent the employee from challenging that action. *Elrod* and its progeny do not directly address that issue. The reasoning of those decisions indicates, however, that when an employer

acts with the unconstitutional purpose of suppressing disfavored political beliefs, its mistake of fact should not absolve it of liability. The government's motive—the crux of an *Elrod* claim—is no different when it is based on a factual error about the nature of the employee's beliefs. Nor does a mistake alter the employee's injury: just like the employees in *Elrod*, *Branti*, and *Rutan*, he has been subjected to an adverse action for an unconstitutional reason. See *Rutan*, 497 U.S. at 72 ("[T]here are some reasons upon which the government may not rely.") (emphasis and citations omitted). Knowledge of the government's purpose, moreover, will create precisely the chilling effect on all employees that the *Elrod* doctrine is designed to prevent.

1. The government's purpose of suppressing political affiliation is the same whether or not that purpose is premised on a mistake of fact

a. *Elrod* and its progeny hold that the government violates the First Amendment when it acts against an employee for the purpose of suppressing political beliefs and association. The government necessarily forms its purpose on the basis of a predicate factual conclusion about the nature of the employee's beliefs. That factual premise may or may not be mistaken. Either way, the government's ultimate purpose remains the same: to enforce political orthodoxy.[1]

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[1] The Court suggested as much in *Branti*. There, the Court treated the government's perception of the employee's affiliation as controlling: although the employee had registered as a Democrat, the Court viewed that fact as inconsequential because, for purposes of the government's practice of dismissing Republicans, "the parties had regarded [the employee] as a Republican at all relevant times." 445 U.S. at 509 n.4.

As this Court has recognized in the context of employment-discrimination claims, "[m]otive and knowledge are separate concepts." *Equal Emp't Opportunity Comm'n* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (*Abercrombie*). An employer can act with a particular motive regardless of the precise state of its knowledge with respect to the underlying facts that motivate its actions. *Ibid.* ("[A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."). Whether an employer acts on the basis of actual knowledge or simply an "unsubstantiated suspicion" that turns out to be wrong, its motive is the same.

b. The constitutionality of the employer's motive therefore should be evaluated based on the facts as the employer believed them to be. The Court has used that approach when the employer's mistake runs the other way—*i.e.*, when the employer reasonably believes, in good faith, that the employee has engaged in activity for which she may permissibly be fired. In *Waters* v. *Churchill*, 511 U.S. 661 (1994) (plurality opinion), the Court held that when an employer fires an employee for her speech based on a mistaken perception of what she said, the constitutionality of the employer's motive should be judged based on the employer's perception. *Id.* at 681. There, the employer erroneously believed the employee had criticized her supervisor in an unprofessional manner, thereby speaking on matters of private concern that constitutionally may serve as the basis for dismissal. *Id.* at 665; see *Connick* v. *Myers*, 461 U.S. 138, 142 (1983) (employee speech on matters of private concern is not

protected by the First Amendment in the context of public employment). The employee claimed, however, that she had been speaking about the effect of the hospital's staffing policies on patient care, a matter of public concern for which the hospital could fire her only if its interest in efficiency outweighed the employee's interest in speaking. *Waters*, 511 U.S. at 665, 668; see *Connick*, 461 U.S. at 142.

Seven Justices agreed that the constitutionality of the dismissal should be judged based on the employer's perception of the content of the employee's speech—the statements the employer "thought she may have made"—even if that perception was incorrect.[2] *Waters*, 511 U.S. at 682; see *ibid.* (Souter, J., concurring); *id.* at 692 (Scalia, J., concurring in the judgment). Thus, although the employee had a "right not to be dismissed * * * in retaliation for her expression of views on a matter of public concern," that "right was not violated" where the employer misperceived the speech as private in nature, "since she was dismissed for another reason, erroneous though it may have been." *Id.* at 692 (Scalia, J., concurring in the judgment).

That reasoning should apply regardless of the nature of the employer's mistake. An employer who mistakenly believes facts that, if true, cannot constitutionally be the basis for adverse action, and who proceeds against the employee, has acted with an uncon-

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[2] The three Justices who concurred in the judgment disagreed with the plurality about the extent to which an employer must investigate before concluding that an employee has made statements for which she can be fired. They agreed, however, that the employer's perception of the speech should be used to perform the *Connick* analysis. *Waters*, 511 U.S. at 686, 692.

stitutional purpose. An employer who fires an employee for having a particular affiliation is attempting to "requir[e] that [the employee's] private beliefs conform to those of the hiring authority," *Branti*, 445 U.S. at 516—even if the employer turns out to be wrong about the employee's affiliation. It is, in short, a two-way street. An employer's conduct is evaluated in light of the facts as the employer perceives them to be, and that is so whether (as in *Waters*) that helps the employer or whether (as here) it does not.

2. A public employer who takes action against an employee based on a mistaken perception of his political affiliation violates that employee's First Amendment rights

a. The *Elrod* line of cases holds that a public employer violates an employee's First Amendment rights when it takes action against him in order to suppress disfavored beliefs. The government's motive of "inhibit[ing] belief and association through the conditioning of public employment on political faith" renders its action against the employee a violation of the employee's rights to freedom of belief and association. *Elrod*, 427 U.S. at 357. That is so whether or not the government actually succeeds in inhibiting association, and whether or not it acts in response to a particular act of association or expression of belief—the government's motive is the sole determinative consideration. See pp. 11-13, *supra*; *Branti*, 445 U.S. at 517 (to "prevail" an employee need only show that he was penalized "solely for the reason" of his beliefs) (citation omitted).

Because the government acts for the same purpose whether or not it is correct about the employee's affiliation or beliefs, it does not matter whether the em-

ployee actually associated with the disfavored party or actually engaged in any First Amendment activity at all. Either way, the employee's right to freedom of association has been violated, because the employee has been subjected to an adverse employment action for the purpose of suppressing his beliefs. That is a "reason[] upon which the government may not rely." *Branti*, 445 U.S. at 514-515 (citation omitted).

b. Respondents contend, however (Br. in Opp. 27), that "an employee cannot recover * * * on the theory that he was retaliated against for exercising a First Amendment right if he did not in fact exercise a First Amendment right." See also Pet. App. 13a. That argument misconceives the nature of the right this Court has recognized against government action taken on the basis of the employee's political beliefs. The Court's decisions make clear that the government does not violate the First Amendment only when it acts in response to particular expression or action that the First Amendment protects: rather, an employer acts unconstitutionally whenever it preemptively acts against employees for *failing* to obtain in-party support—whether that failure reflects an exercise of the employee's First Amendment right not to associate or simple apathy. *Rutan*, 497 U.S. at 66-67; *Elrod*, 427 U.S. at 351; see pp. 11-12, *supra*. That is because the *Elrod* line of cases protects "employees' *freedom* to believe and associate, or to not believe and not associate." *Rutan*, 497 U.S. at 76 (emphasis added). That freedom of belief is inhibited whenever the government "wield[s] its power" for the purpose of suppressing First Amendment activity, regardless of whether

the targeted employee actually engaged in that activity.[3] *Ibid.*

Respondents, like the court of appeals, also argue that the thrust of petitioner's claim is that respondents "demoted him on a factually incorrect basis." Pet. App. 13a; see Br. in Opp. 27 n.4. That claim does not state a First Amendment violation, respondents contend, because the *Waters* plurality stated that "[w]e have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." 511 U.S. at 679. But the *Waters* plurality was simply making the point—expressed in the immediately following sentence—that when an employer has followed "adequate procedure[s]," the employee's due process rights are not violated purely because the employer's information was incorrect. *Ibid.*; see *id.* at 695-696 (Stevens, J., dissenting) (arguing that due process does require the employer to act on correct information).

That statement of due-process standards is doubly inapplicable here. Petitioner's claim is not that his demotion violated the First Amendment *because* the information on which respondents acted was incorrect; rather, his claim is that respondents acted for a pur-

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[3] Respondents also rely (Br. in Opp. 29-31) on the Court's statement in *Perry* that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." 408 U.S. at 597. That statement does not purport to resolve the question presented here. The Court had no occasion to consider whether a public employer acts "because of [an employee's] constitutionally protected speech or associations," *ibid.*, when it mistakenly believes the employee engaged in such activities.

pose forbidden by the First Amendment, albeit based on information that turned out to be wrong. Cf. *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 606 (2008) (while an at-will employee may constitutionally be dismissed based on "substantively incorrect information," she may not be dismissed when doing so "would independently violate the Constitution") (citation omitted). *Waters* does not suggest that when an employer's information is incorrect, it may act in ways that would be unconstitutional if its information were accurate. If anything, *Waters*' recognition that the constitutionality of the employers' action should be judged based on the facts as the employer perceived them to be suggests the opposite. See pp. 15-17, *supra*.

3. Perceived-affiliation dismissals chill all public employees' exercise of their association rights

The prohibition on "conditioning employment on political activity" is founded on the recognition that such conditions "unquestionably inhibit[] protected belief and association" of all public employees. *Rutan*, 497 U.S. at 69, 75-76 (citation omitted); *Branti*, 445 U.S. at 513-516. The chilling effect caused by the employer's enforcement against any particular employee is no less severe when the employer turns out to be wrong about the facts that formed the basis for its decision. Whether the employer is right or wrong, the message to other employees is clear: their job is subject to their employer's perception that they maintain the "correct" political affiliation. The coercion that results from employees' "knowledge that one must have a sponsor in the dominant party" is not diminished simply because the government applies

that policy without regard to employees' actual beliefs. *Branti*, 445 U.S. at 516.

Indeed, employees' politically associative activity would be *more* severely inhibited if public employers were absolved of liability when their perceptions are incorrect. An individual's personal political beliefs are often the subject of inferences that others draw based on the person's actions—including actions not intended to express any particular belief. Characteristics such as what current events a person follows, what publications he reads, what charitable organizations he joins, and even how he dresses all could serve as the basis for inferences about the person's political leanings. If a public employer could take action against employees based on mistaken inferences about the employees' beliefs, that knowledge would chill not only employees' actual association, but also conduct that could be *mis*perceived as reflecting a political persuasion. Employees would have to think twice before joining a friend at a campaign event simply to learn more about a candidate—or, for that matter, before subscribing to the *New York Times* or the *Wall Street Journal*.

The potential chilling effect on public employees militates strongly in favor of prohibiting employers from taking action against employees based on their mistaken perceptions of the employees' beliefs. The Court has emphasized that an employee's right against political-affiliation dismissals must be broad enough effectively to prevent the chilling effect that such dismissals inflict on all employees. See *Branti*, 445 U.S. at 516 (holding that a dismissed employee need not show that his personal exercise of beliefs was chilled because such a rule would "emasculate" the

protection of *Elrod* by failing to fully "eliminate the coercion of belief" with respect to other employees). That same concern is present here: because a perceived-affiliation dismissal is just as chilling as a dismissal based on an employee's actual affiliation, it is necessary to prohibit both in order to effectively guard against the inhibiting effects on public employees' beliefs and associations.[4]

4. The court of appeals' contrary view would lead to anomalous results

Under the court of appeals' view, an employee's protection against being subject to adverse action "solely because of his private political beliefs," *Branti*, 445 U.S. at 517, would turn on whether the employer's perception of his affiliation happens to be right. That regime would lead to a number of arbitrary and unjustified results.

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[4] The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, which creates a comprehensive "framework for evaluating adverse personnel actions against federal employees," *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (brackets and citation omitted), contains provisions relevant to political-affiliation discrimination against federal employees. The CSRA prohibits "any personnel action" that "discriminate[s]" against an employee "based on * * * political affiliation." 5 U.S.C. 2302(b)(1)(E). The Merit Systems Protection Board (MSPB), which adjudicates employee appeals of certain serious personnel actions, see, *e.g.*, 5 U.S.C. 4303(e), 7701(a), has occasionally considered claims that a personnel action violated Section 2302(b)(1)(E) because it was based on the employee's perceived political affiliation, but it has not squarely addressed whether Section 2302(b)(1)(E) prohibits perceived-affiliation discrimination. See, *e.g.*, *Heelen* v. *Department of Commerce*, 75 M.S.P.R. 366, 367-370 (1997), rev'd on other grounds, 154 F.3d 1306 (Fed. Cir. 1998).

a. The court of appeals' rule would treat employees who have engaged in similar conduct differently based solely on the accuracy of the employer's suspicions. Imagine two employees, each of whom receives in his office mail an invitation to a lecture sponsored by the American Constitution Society. Both leave the invitation on their desks. One is a member who supports the Society and progressive causes, and intends to attend the lecture; the other is not a member and simply forgot to throw the invitation away. Both are dismissed because the employer assumes that they must be members of the Society and therefore supporters of the Democratic Party. Under respondents' position, the first employee would be able to assert that his First Amendment rights were violated, but the second would not.

That makes little sense. In each case, the employer has acted with the intent to suppress the employees' beliefs. In each case, the employer has scrutinized the employee's actions and possible beliefs in service of a practice of enforcing political orthodoxy. Both employees have been dismissed for an invalid reason, and both dismissals will contribute to a chilling effect on other employees' exercise of their rights of belief and association. Indeed, the mistaken dismissal will likely enhance the chilling effect of the employer's policy, as employees will feel that they have to avoid any conduct that could be misperceived as association with the disfavored party. See p. 21, *supra*.

b. The court of appeals' regime would also treat public-employer mistakes differently depending on whether the mistake is favorable to the employer. As explained above, when the employer's reasonable mistake of fact leads it to act with the intent to penal-

ize unprotected activity, it will not be liable, even if the employee actually engaged in protected activity. See *Waters*, 511 U.S. at 681. That rule reflects the fact that when the employer acts with a legitimate motive (even if based on mistaken factual premises), its action does not violate the employee's First Amendment rights and is unlikely to chill the protected activities of other employees. See *id.* at 692 (Scalia, J., concurring in the judgment). Respondents would absolve the employer, however, whenever its mistake leads it to act for an unconstitutional motive—even though that purpose inflicts the precise harms with which *Elrod* is concerned.

Indeed, under the court of appeals' view, the employer treated most favorably is the one that is both politically motivated and willing to act on unsubstantiated suspicions. This Court has sharply limited the areas in which a public employer can act to suppress an employee's beliefs or associations. See *Branti*, 445 U.S. at 517. When an employer acts with that intent, it should not receive a free pass when it happens to be wrong about the facts. Otherwise, an employer would have incentive to act preemptively—for instance, immediately upon taking office—on the basis of untested doubts about employees' loyalty, before employees have had a chance to engage in any affirmative exercise of First Amendment rights.

c. Finally, if a public employer's accuracy about the targeted employee's beliefs determined its liability, courts would have to inquire into the substance of the employee's beliefs. *Elrod*, however, holds that "the raw test of political affiliation suffice[s] to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the re-

quirement was appropriate for the employment in question." *O'Hare*, 518 U.S. at 719. That "confin[ed]" inquiry reflects the recognition that "one's beliefs and allegiances ought not to be subject to probing or testing by the government." *Ibid.*

If the accuracy of the employer's perception of the employee's beliefs is determinative, the factfinder will have to engage in precisely the probing of beliefs that *Elrod* is designed to prevent. Plaintiffs would be motivated to assert that they in fact hold the beliefs ascribed to them, while employers may defend on the ground that they were mistaken about the plaintiffs' beliefs. The factfinder will have to resolve the resulting disputes about the content of the plaintiff's beliefs or the extent of his association. There is no reason to adopt an understanding of the First Amendment that would routinely lead to the sort of intrusive inquiries that the Amendment seeks to prevent. Cf. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("It is well established * * * that courts should refrain from trolling through a person's or institution's religious beliefs.").[5]

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[5] Conversely, permitting perceived-affiliation claims like petitioner's is unlikely to encourage plaintiffs to file frivolous suits. It is true that if the accuracy of the employer's perception is irrelevant, the plaintiff need not prove that he actually held the beliefs ascribed to him. But that will not materially diminish the courts' ability to dismiss meritless claims. The primary hurdle for a plaintiff asserting an *Elrod* claim (whether based on perceived or actual affiliation) is establishing that the employer's perception of the employee's beliefs was in fact the cause of the adverse employment action. Plaintiffs who fail to allege facts supporting a plausible inference that the employer acted for that impermissible purpose will not survive a motion to dismiss or a motion for summary judgment. See, *e.g.*, *Pashayev* v. *MSPB*, 544 Fed. Appx.

C. This Court Should Vacate And Remand To Permit The Parties To Litigate Petitioner's Claim, Including The Basis On Which He Was Demoted

As this case comes to the Court, it presents the question whether petitioner's claim that he was demoted for his political affiliation is foreclosed because respondents' perception of petitioner's affiliation was incorrect. See Pet. i; Pet. Br. 12. Before the court of appeals, both parties treated petitioner's claim as asserting that he was demoted in violation of *Elrod*; the dispute centered on whether the inaccuracy of respondents' perception foreclosed that claim. See Pet. C.A. Br. 32 (citing *Elrod*, 427 U.S. at 359); J.A. 16 (Compl. ¶ 28); Resp. C.A. Br. 26 (characterizing petitioner's claim as one brought under *Elrod*, and asserting that such a claim requires the plaintiff to demonstrate that he maintained a political affiliation). The court resolved that dispute in respondents' favor, holding that respondents were entitled to summary judgment on petitioner's "perceived-support" claim because petitioner had not actually engaged in any

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1006, 1010 (Fed. Cir. 2013) (per curiam) (affirming MSPB's conclusion that employee "failed to satisfy the burden of making a nonfrivolous allegation" that he was dismissed because of the perception that he was a Communist). As discussed below, moreover, courts have permitted mistaken-perception claims under various federal anti-discrimination and retaliation statutes. See Part II, *infra*. There is no reason to think that those decisions have spurred an increase in meritless claims. See, *e.g.*, *Nathaniel* v. *Mississippi Dep't of Wildlife, Fisheries & Parks*, No. 07-cv-549, 2010 WL 2106953, at *5-*6 (S.D. Miss. May 25, 2010) (dismissing Title VII mistaken-perception retaliation claim for insufficient evidence), aff'd, 411 Fed. Appx. 687 (5th Cir. 2010) (per curiam); *Boyer* v. *Pilot Travel Ctrs., LLC*, No. 05-cv-978, 2007 WL 708599, at *6 (W.D. Tex. Mar. 7, 2007).

"protected activity under the First Amendment." Pet. App. 13a. For the reasons stated above, that conclusion was erroneous. The case therefore should be remanded to permit the lower courts to adjudicate petitioner's perceived-affiliation claim.

On remand, the lower courts may need to resolve a factual dispute concerning the actual motive for petitioner's demotion. Before the district court, respondents at times asserted that petitioner was demoted not because of his perceived partisan affiliation, but instead because of his perceived violation of an unwritten policy prohibiting officers in the Chief's Office from engaging in *any* partisan political activities. See 06-cv-3882 Docket entry No. 189-1, at 38 (Mar. 8, 2013) (Resp. Mem. of Law in Supp. of Summ. J.) (asserting need for additional discovery concerning any department policy forbidding partisan activities). The factual record before the courts contains conflicting evidence with respect to respondents' motive. Compare, *e.g.*, C.A. App. A219-A221 (Chief Wittig testified that "I don't need personnel working in my office that give the appearance that we are overtly supporting or endorsing any political candidate, regardless of who that political candidate is"); *id.* at A633-A634, with *id.* at A215, A237, A301 (officer testimony disputing the existence of such a policy); *id.* at A363-A364 (testimony concerning "ramifications" for supporting Spagnola). The lower courts do not appear to have resolved that factual dispute. See, *e.g.*, Pet. App. 3a (citing testimony that petitioner was demoted because of his "overt[] involvement in a political election") (brackets in original); *id.* at 38a (noting evidence that supervisors told petitioner that "he was being transferred

because of his political affiliation") (internal quotation marks omitted).

If the lower courts conclude on remand that petitioner was demoted pursuant to a neutral policy forbidding all partisan activity, petitioner's First Amendment challenge would not be governed by *Elrod*. Instead, the validity of a neutral policy prohibiting all partisan activities would be governed by the standards set forth in *Letter Carriers*.[6] See 413 U.S. at 564; pp. 8-9, *supra*. The Court need not address those issues here, however, as the parties and the lower courts have to this point focused on whether petitioner could assert a claim that he was demoted in violation of *Elrod* despite the fact that he did not engage in the political association his supervisors perceived.

II. MISTAKEN-PERCEPTION ISSUES OFTEN ARISE IN THE CONTEXT OF CLAIMS BROUGHT UNDER FEDERAL DISCRIMINATION AND RETALIATION STATUTES, WHERE THE VIABILITY OF THE CLAIM DEPENDS ON THE PROPER CONSTRUCTION OF THE STATUTE IN QUESTION

The question whether an employee may challenge an adverse employment action taken because of the employer's mistaken perception also arises in the context of federal statutes prohibiting both public and private employees from discrimination and retaliation.[7] Whether an employee may assert a claim under

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[6] A neutral prohibition on partisan activities may also be subject to challenge on overbreadth or vagueness grounds. See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 606-608, 616-618 (1973).

[7] Numerous statutes prohibit employment discrimination on the basis of various criteria, such as race, national origin, sex, religion,

those statutes based on an employer's mistaken perception that the employee was a member of a protected class, or engaged in a protected activity, turns on the proper construction of the applicable statute. As a result, the Court's decision in this case will not resolve—and this Court should not seek to resolve—similar questions arising in the federal statutory context. Cf. *Waters*, 511 U.S. at 674 (observing that statutory protections may extend "beyond what is mandated by the First Amendment").

The language of the relevant statutory provisions varies. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, is perhaps the most explicit, as it prohibits discrimination against anyone who has, or is "*regarded* as having," certain disabilities. 42 U.S.C. 12102(1)(C) (emphasis added); see 42 U.S.C. 12112(a). This Court has accordingly held that "a person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person[]" has a disability. *Murphy* v. *United Parcel Serv., Inc.*, 527 U.S. 516, 521-522 (1999).

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age, disability, and military service. See, *e.g.*, Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, 2000e-2; Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*; Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12112; Uniformed Services Employment and Reemployment Rights Act of 1964 (USERRA), 38 U.S.C. 4311(a). These and other statutes also prohibit retaliation against employees who engage in statutorily protected activities, such as filing a charge of discrimination or exposing fraud. See, *e.g.*, ADA, 42 U.S.C. 12203(a); ADEA, 29 U.S.C. 623(d); FLSA, 29 U.S.C. 215(a)(3); National Labor Relations Act, 29 U.S.C. 158(a)(3) and (4); Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1); USERRA, 38 U.S.C. 4311(b).

Title VII, by contrast, does not employ any comparable language; instead, it prohibits discrimination against any individual "*because* of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1) (emphasis added). The Equal Employment Opportunity Commission (EEOC) has construed that provision to prohibit "[d]iscrimination against an individual based on a perception of his or her race * * * even if that perception is wrong." EEOC, *Directives Transmittal—Compliance Manual, Section 15: Race and Color Discrimination, No. 915.003*, Pt. 15-II, at 15-5 (2006); see 45 Fed. Reg. 85,633 (Dec. 29, 1980) (discrimination can be based on perception of characteristics associated with national origin, even if the employer does not know the plaintiff's "*particular* national origin group"). Courts of appeals have similarly held that an employer may be held liable for discriminating "because of" race or national origin even if the employer was mistaken about, or unaware of, the plaintiff's true race or origin. See, *e.g.*, *Jones* v. *UPS Ground Freight*, 683 F.3d 1283, 1299-1300 (11th Cir. 2012); see also *EEOC* v. *WC&M Enters., Inc.*, 496 F.3d 393, 401 (5th Cir. 2007).[8]

With respect to anti-retaliation provisions, courts of appeals have held that an employer violates provisions forbidding retaliation "because" the employee has engaged in a protected activity when it acts on the mistaken belief that the employee engaged in that

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[8] Some district courts, however, have held that persons who are perceived to fall into a protected class, but do not in fact do so, cannot pursue a Title VII claim. See, *e.g.*, *Lewis* v. *North Gen. Hosp.*, 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007) (citing cases) (explaining that Congress could have specified that Title VII reached "'perceived religion' discrimination," but "[i]t did not").

activity. See, *e.g.*, *Fogleman* v. *Mercy Hosp., Inc.*, 283 F.3d 561, 571 (3d Cir.) (the anti-retaliation provisions of the ADA, 42 U.S.C. 12203(a), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(d), "focus on the employer's subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus are actually correct"), cert. denied, 537 U.S. 824 (2002); *Saffels* v. *Rice*, 40 F.3d 1546, 1548-1550 (8th Cir. 1994) (The FLSA's prohibition on retaliation "because such employee has filed any complaint," 29 U.S.C. 215(a)(3) (emphasis omitted), applies when the employer wrongly believes the employee has filed a complaint.); *Brock* v. *Richardson*, 812 F.2d 121, 124-125 (3d Cir. 1987) (same); but cf. *McKinney* v. *Bolivar Med. Ctr.*, 341 Fed. Appx. 80, 83 (5th Cir. 2009) (per curiam) (observing that "the Fifth Circuit has not adopted this perception theory of retaliation").

Those decisions rest on some of the same considerations that support holding a public employer liable for action based on the mistaken perception that the employee has engaged in disfavored First Amendment activity For instance, the courts have recognized that an employer can act with a prohibited motive even if its understanding of the facts is incorrect. See *Fogleman*, 283 F.3d at 571; cf. *Abercrombie*, 135 S. Ct. at 2033 ("[T]he intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts."). They have also reasoned that the chilling effect of a retaliatory discharge is no less severe when the employer is wrong about the employee's having engaged in protected activity. *Brock*, 812

F.2d at 125 ("discharge of an employee in the mistaken belief that the employee has engaged in protected activity creates the same atmosphere of intimidation as does the discharge of an employee who did in fact complain of FLSA violations"). Ultimately, however, the question whether a given statute prohibits adverse employment actions based on a mistaken belief about an employee's status or activities will turn on the proper construction of the statute in question.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted.

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In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,
Petitioner,

v.

CITY OF PATERSON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether Respondents violated Petitioner's right to freedom of assembly under the First Amendment.

Whether Respondents violated Petitioner's right to engage in speech activities in concert with others.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among many others, in lawsuits across the country and around the world.

The Becket Fund frequently represents religious people who seek to vindicate their constitutional rights against government overreach, both as individuals or in community with others. See, *e.g.*, *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012). In particular, the Becket Fund has long sought to vindicate the rights of people of all faiths to assemble together for worship. See, *e.g.*, *Islamic Center of Murfreesboro* v. *Rutherford Cty., Tenn.*, No. 3:12-cv-738 (M.D. Tenn., complaint filed July 18, 2012); *Elijah Group, Inc.* v. *City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011); *Congregation Kol Ami* v. *Abington Twp.*, 2004 WL 1837037 (E.D. Pa. 2004); *Hale O Kaula Church* v. *Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002).

The Becket Fund is concerned that—if the Third Circuit's decision is allowed to stand—the ability of religious people to engage in religious activity in con-

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. Consents to the filing of this brief are on file with the Clerk.

cert with one another will be wrongly limited. It therefore advocates that the Court re-root the jurisprudence of collective rights in the text and history of the First Amendment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Third Circuit's determination that the outlandish behavior of Respondents did not violate the Constitution is a symptom of a deeper problem lurking within First Amendment doctrine: Courts often don't know what to do about collective rights because they lack the proper tools to address certain claims.

Indeed, the Third Circuit reached the obviously flawed result at issue here precisely because the court felt constrained to choose only between a watered-down "freedom of association" unmoored from the history and text of the First Amendment, or an individual-focused speech claim that overlooks the collective dimensions of speech. See Pet. App. 10a (association claim failed because "Heffernan * * * did not have any affiliation with the campaign other than the cursory contact necessary for him to pick up the sign for his mother"); *ibid.* (holding that speech claim required a "find[ing] that Heffernan intended to convey a political message when he picked up the sign at issue"). In essence, the court reviewed Heffernan's First Amendment claims solely through the prism of his individual activity, rather than his activity in concert with others. But government defendants can often defeat constitutional rights if they are allowed to slice the protected activity into its constituent parts and analyze each part separately, rather than analyzing the activity as a whole and in context.

See, *e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 709 ("The issue before us, however, is not one that can be resolved by a stopwatch."). Constitutional freedoms are not meant to be measured out by coffee spoons, but that is precisely what the Third Circuit did here. It treated the associational claim as a matter of whether Officer Heffernan had meant to associate with the political campaign as opposed to the question of whether he had engaged in the First Amendment protected right of assembling with others, regardless of his purpose or expression for that assembly.

Perhaps the surest sign that First Amendment doctrine has gone astray is that the Third Circuit could conclude that in this case there was no First Amendment protected conduct at all. Pet. App. 13a ("To paraphrase our colleague, Judge Roth, 'a [First Amendment] claim depends on [First Amendment protected conduct], and there was none in this case.'") (quoting *Pro* v. *Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996) (Roth, J., dissenting)) (alterations in original). When a federal court can see no First Amendment conduct when a citizen assembles with other people and picks up a political campaign sign for another who wishes to display it, that is not mere error—that is a symptom of a doctrinal problem. That doctrinal problem results from a disconnect between existing jurisprudence concerning collective rights and the text and history of the First Amendment. The First Amendment contains at least two categories of protections for collective rights, both of which have gotten less attention than they ought.

The first category is obvious from the text: "the right of the people peaceably to assemble." U.S.

CONST. amend. I. The right to assemble with others—at least if one relies on the text of the Constitution—should be a standalone right, rather than one that is merely derivative of or auxiliary to other rights.

Yet as the scholarship of Professor John Inazu has demonstrated, the freedom of assembly has been "forgotten," replaced by a jurisprudence of freedom of association that is a poor substitute for the full spectrum of protections that naturally inhere in the historic freedom of assembly the Founders put into the First Amendment. Freedom of association as applied by the lower courts is a particularly weak protection because it tends to be preceded by adjectives—"political," "intimate," "expressive"—that limit its scope, and because those rights are interpreted in a way that is oddly separate from other parts of the Constitution. Lower courts would do better to rely on the specific, textual right set out in the Constitution.

The second category of collective rights derives from the very nature of the rights protected by the Constitution. In many cases collective rights are so bound up with and integral to a particular protection that it is impossible to conceive of the right properly without including the collective dimension. For instance, freedom of speech can be exercised by both individuals and groups, and it would mean little without the ability to speak to an audience. Similarly, freedom of the press is both an individual right and a collective right, and it makes no sense if no one is allowed to read newspapers.

In the context of freedom of religion, the necessarily collective dimension of religious exercise is particularly obvious: One can't make a minyan, per-

form a baptism, preach a sermon, conduct *jum'ah* prayers, or take *amrit* without involving more than one person. The right to group religious exercise is one that is enjoyed both by the group itself and by the individual who is part of the group. The church has a right to give the sermon, but the parishioner has a right to hear the sermon too. By contrast, "freedom of religion" reduced to an entirely individual right would be nothing like the freedom of religion protected by the Founders.

As described below, that more robust understanding of the nature of collective rights reflects the understanding at the time of the Founding, as well as the decisions of this Court since the Founding. It also mirrors the provisions of international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), which is careful to protect the right of religious freedom "either individually or in community with others." ICCPR art. 18.1, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. Yet the lower courts, like the Third Circuit here, have at times been confused about how those rights play out in practice, in part because they have made the right too monistic, focusing on the individual in a vacuum rather than the right of the individual to engage in activities in concert with others.

Amicus suggests that the solution to that confusion is to return collective rights to their textual and historical basis in the Constitution. An understanding that collective rights are both expressly protected by the Assembly Clause and integrally protected by other express protections in the Bill of Rights would

take the lower courts a long way toward a jurisprudence that reflects both our constitutional tradition and modern realities.

For the Court to undertake such a move toward text and history would hardly be unusual. In recent decades, this Court has undertaken an extensive program of re-rooting other parts of the Bill of Rights into the text and history of the Constitution, including the First, Second, Fourth, Fifth, Sixth, and Fourteenth Amendments. In all of these areas, the Court routinely looks to both the text and the historical meaning of key constitutional terms. See, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 (2000) (examining "the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding"); *Crawford* v. *Washington*, 541 U.S. 36, 43-44 (2004) (examining "the historical background of the [Sixth Amendment's Confrontation] Clause to understand its meaning"); *District of Columbia* v. *Heller*, 554 U.S. 570, 598 (2008) (examining "the history that the founding generation knew" to interpret the Second Amendment) and *id.* at 642 (Stevens, J., dissenting); (examining "contemporary concerns that animated the Framers"); *United States* v. *Jones*, 132 S. Ct. 945, 950 & n.3 (2012) (examining the "original meaning of the Fourth Amendment," because "we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted") (citations omitted); *Hosanna-Tabor*, 132 S. Ct. at 702-4 (2012) (describing historical problems with English governmental control of church bodies and concluding "[i]t was against this background that the First Amendment was adopted");

Horne v. *Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) (discussing Takings Clause in light of Magna Carta).

Yet without such a move toward text and history, freedom of assembly will remain a forgotten byway of constitutional law, and the collective dimension of many constitutional rights will remain overlooked. The Court should take the opportunity afforded by this case to remember the Assembly Clause and to put the entire set of collective rights on a firmer textual and historical foundation.

ARGUMENT

I. The Constitution protects collective rights.

As we demonstrate below, the Constitution is designed to protective collective freedoms—both of the group and of the individual acting within the group—by various means. Two of those means are the Assembly Clause and the collective dimension of rights such as freedom of speech, free exercise of religion, and freedom of the press.

A. Freedom of assembly is a standalone right under the First Amendment.

The Constitution recognizes "the right of the people peaceably to assemble." U.S. CONST. amend. I. Throughout American history, this right has protected both assemblies that advance the status quo and those that challenge it. Although it is sometimes conceived of as an emanation of other rights like speech or religion, the right of assembly has independent force, reflected in its specific enumeration in the First Amendment. The Founders understood what despots everywhere have long known: if the state can keep people from assembling, the state can prevent every

other fundamental freedom from ever truly challenging the status quo.

Yet as Professor Inazu has demonstrated in both his pathbreaking article *The Forgotten Freedom of Assembly* and his subsequent book *Liberty's Refuge*, freedom of assembly has been "forgotten."[2] The freedom of assembly protected by the Founders has been replaced with the far weaker "freedom of association" that is constitutionally both atextual and ahistorical. As Professor Michael McConnell has argued:

> The Supreme Court refers to "freedom of association" even though those words do not appear in the First Amendment. Professor John Inazu persuasively argues that freedom of association is derived from freedom of assembly, but the Court appears to derive the right as one "implicit" in the freedom of speech.

Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 825 (2012).

Amicus believes that freedom of assembly should be unforgotten. That will both avoid absurd results like the one in this case and also protect more people across the run of cases in the lower courts.

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[2] See John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. 565 (2010); John D. Inazu, *Liberty's Refuge: the Forgotten Freedom of Assembly* (2012) (Inazu, *Liberty's Refuge*).

1. The broad right of assembly creates crucial space for political and social dissent.

When adopting the First Amendment, the Founders considered and rejected the idea that, in order for an assembly to be protected, it had to serve the "common good." Inazu, *Liberty's Refuge* at 21-22. The decision to adopt a broad right of assembly has had momentous consequences for American civic life. The Democratic-Republican Societies that organized grassroots political opposition to President Washington and the Federalists relied on the right of assembly, as did the women suffragists and abolitionists who stared down pro-Union rioters in the years before the Civil War. See *id.* at 25-28, 32-35. The right to assemble without having to show that your assembly furthered a court's or bureaucrat's idea of the "common good" provided crucial protection for these early groups and set the stage for the decades that followed.

At the First Congress, all of the early drafts of the First Amendment limited protection to assemblies that served the "common good." Inazu, *Liberty's Refuge* at 21-22. But during the House debates, Elbridge Gerry of Massachusetts argued that if it were "supposed that the people had a right to consult for the common good" but "could not consult unless they met for that purpose," the amendment would protect nothing. *Id.* at 22. The phrase "for their common good" was eventually dropped from the Senate ver-

sion of the amendment.[3] *Ibid.* Thus the final text protects peaceful assemblies whether or not government officials believe that the gathering will serve the common good.[4]

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[3] As Prof. Inazu points out, some have argued that freedom of assembly is limited to gatherings connected with government petitions. See Inazu, *Liberty's Refuge* at 23 (quoting Jason Mazzone, *Freedom's Associations*, 77 Wash. L. Rev. 639 (2002)). Inazu explains how the text of the actually-adopted version of the First Amendment does not support this view. See Inazu, *Liberty's Refuge* at 21-25. The Congressional debate surrounding the final text also shows that the Founders understood free assembly to protect all kinds of lawful gatherings—including religious meetings like William Penn's open air religious service—and that the right to assemble and the right to petition were thus separate rights. See *id.* at 23-24.

[4] Much of the confusion around the scope of assembly appears to come from dicta in the dubious *United States* v. *Cruikshank*, 92 U.S. 542 (1875). In the course of holding that the First Amendment did not guarantee the right of assembly against infringement by private actors, the court remarked that "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship." *Id.* at 552. Eleven years later, in *Presser* v. *People of State of Illinois*, the court quoted just the first half of this statement in *Cruikshank* and concluded on that basis that "the right peaceably to assemble was not protected by the clause referred to, unless the purpose of the assembly was to petition the government for a redress of grievances." 116 U.S. 252, 267 (1886). But later cases have adopted a far broader view of

The founding generation lost no time in using this right to challenge the political status quo: between 1793 and 1796 dozens of Democratic-Republican Societies were organized in most of the major cities in the United States by farmers and laborers unhappy with George Washington's administration. See Inazu, *Liberty's Refuge* at 25 & nn.11, 12. These societies, which organized public celebrations that included women, the poor, and enslaved people, "invariably" relied on the right of assembly. *Id.* at 25-26. Perhaps unsurprisingly, President Washington strongly opposed these societies, questioning their right to exist and linking them to the violent Whiskey Rebellion. *Id.* at 27-28. Although the movement eventually died out, it laid the groundwork for a major shift in power with the subsequent defeat of the Federalists and rise of Thomas Jefferson. See *id.* at 28-29. And it is simple to see how language that protected only assemblies that served the "common good" could have been used to nip them in the bud.

A limitation for the "common good" would likewise have rendered the right of assembly useless for the other groups that benefitted significantly from its protection in the 19th Century: abolitionists and suffragists. Because many of these activists were women, "freedom of assembly was indelibly linked with the women's rights movement." Inazu, *Liberty's Refuge* at 32 (quotation omitted). Throughout the 19th

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the right of assembly. See, *e.g.*, *Heller*, 554 U.S. at 591; *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); see also Inazu, *Liberty's Refuge* at 38-40 (discussing *Cruikshank* and *Presser*).

Century, women abolitionists and suffragists organized meetings and conventions challenging the political and economic status quo—culminating in the famous 1848 convention in Seneca Falls, New York. See *id.* at 32-33. The abolitionist meetings in particular were deeply unpopular in the decades before the Civil War: rioters defending "Union" and opposing abolition tried to lynch abolitionist William Lloyd Garrison in Boston in 1835 and in 1837 burned down the Philadelphia hall where the Convention of American Women Against Slavery was meeting. See *id.* 34-35. Against this background of deep political division and civil unrest, a decree denying abolitionists the right to assemble on the ground that their opposition to slavery threatened the "common good" of national union practically writes itself. Fortunately for the abolitionists, and for human rights, the First Amendment contains no such limitation.

2. The independent right of assembly is necessary to adequately protect the other fundamental rights in the First Amendment.

Despite its importance to early Americans, today the right of assembly is largely neglected, with cases that would fit naturally under "the right of the people peaceably to assemble" being brought instead under the freedom of association that has been held to emanate from other guarantees in the First Amendment. This anomaly is largely the legacy of mid-century debates about how to best incorporate the First Amendment against the states, and it is not without cost. It introduces an unnecessary layer of complexity to the legal analysis. Returning the right

of association to its textual and historical roots in freedom of assembly would help bring simplicity and clarity to this area of the law without sacrificing crucial protections.

But is an independent right of assembly really necessary? The Founders grappled with this question too. During the First Congress, Theodore Sedgwick of Massachusetts argued that freedom of assembly was redundant with freedom of speech and therefore unnecessary. See Inazu, *Liberty's Refuge* at 23. He was rebuffed when John Page of Virginia referred obliquely to William Penn, the Quaker leader who was arrested and tried for holding an open-air worship meeting in London. See *id.* at 23-24. Congressman Page pointed out that without the right to assemble, every other right in the First Amendment could be rendered meaningless by government officials that had too often shown (in Penn's case and others) a willingness to suppress lawful assemblies. After his speech, Congressman Sedgwick's motion to strike the amendment was voted down "by a considerable majority," and assembly entered the First Amendment as an independent right. *Id.* at 24.

Page's words were tragically prophetic because in the years before the Civil War, Southern states systematically stripped free African-Americans of their right of assembly. An 1800 South Carolina law forbade enslaved people and free African-Americans from assembling for "mental instruction or religious worship." Inazu, *Liberty's Refuge* at 31. An 1831 Virginia law made all meetings of free African-Americans "at any school house, church, meeting house, or other place for teaching them reading or

writing, either in the day or night" unlawful. *Ibid.* Following Nat Turner's 1831 rebellion, states made the restrictions even harsher. "By 1835, most southern states had outlawed the right of assembly and organization by free blacks" and "prohibited them from holding church services without a white clergyman present." *Ibid.* After the Civil War, organized groups of domestic terrorists like the Ku Klux Klan used violence and intimidation to prevent African-Americans from exercising any of their constitutional rights, including especially their right of assembly.[5]

These tragic examples prove the Founders' wisdom: repressive regimes rely on assembly restrictions to keep other fundamental rights in check. An express constitutional right of assembly stops the march of repression early, before it has reached the doorway of a private home or the inner sanctum of individual conscience.

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[5] Inazu, *Liberty's Refuge* at 36-38. Perhaps the most notorious of these incidents is the Colfax Massacre of 1873, in which a group of white supremacists slaughtered African-Americans who had surrendered after defending Republican officials they helped to elect. See *id.* at 37-38. Among other things, federal prosecutors charged the suspects with preventing African-American citizens from enjoying their right of assembly. Out of 100 men prosecuted for the massacre, only three were convicted—and their conviction was overturned when the Supreme Court concluded that the federal right of assembly did not protect against infringements by private citizens. See *ibid.*; *Cruikshank*, 92 U.S. at 542.

Fortunately, as the twentieth century dawned, the freedom of assembly enjoyed a renaissance, as labor organizers increasingly took advantage of its protection to argue for, and achieve, greater rights. See Inazu, *Liberty's Refuge* at 51. By 1939, "assembly joined religion, speech, and press as one of the 'Four Freedoms' celebrated at the New York World's Fair," and journalists hailed assembly as "the most essential right of the four," because it was necessary to fully exercise the other three. *Id.* at 54-55.[6] Later the same year, the Supreme Court used the right of assembly to rule against a New Jersey mayor who refused to let a labor group hold public meetings in his city. See *Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 501 (1939). Six years later this Court reaffirmed the right in another labor case, this time involving a union organizer prevented from giving a speech in Texas. See *Thomas* at 530-31. In short, by the 1940s, the right of assembly appeared firmly fixed as the fourth column of the First Amendment.

In 1958, however, the Court moved away from the textually-grounded right of assembly and toward a "right of association" arising out of the right to free speech. In *NAACP* v. *Alabama ex rel. Patterson*, a unanimous Court held that it was "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable as-

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[6] Pictures of the Leo Friedlander statues of the Four Freedoms at the World's Fair can be seen here: 1939 New York World's Fair, *The Four Freedoms*, Theme Center Statues http://www.1939nyworldsfair.com/worlds_fair/wf_tour/statues/4-freedoms.htm (last visited Nov. 23, 2015).

pect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. 449, 460 (1958). This apparent unanimity masked significant internal debate over where the new right of association was located—in the First or Fourteenth Amendment. See Inazu, *Liberty's Refuge* at 81-83. Perhaps the Court used "association" rather than "assembly" because *Patterson* involved the NAACP's fight to keep its membership records private, while assembly connoted a public gathering. But whatever the reason, in the following decades the Court applied the new right of association unevenly—routinely vindicating the rights of the NAACP, while rejecting most cases involving communist groups.[7] The trend became so pronounced that Harry Kalven proclaimed "The Communists cannot win, the NAACP cannot lose." *Virtual Assembly*, 98 Cornell L. Rev. at 1116.

Lacking a clear textual anchor, the right of association continued to evolve in the 1980s and 1990s, when the Court began to distinguish between "intimate association," safeguarded as a "fundamental element of personal liberty," and "expressive associa-

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[7] John Inazu, *Virtual Assembly*, 98 Cornell L. Rev. 1093, 1116 & nn.107, 108 (2013) (comparing *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296 (1961); *Shelton* v. *Tucker*, 364 U.S. 479, 485–86 (1960); *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960); *Patterson*, 357 U.S. at 460 with *Communist Party of the U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *Uphaus* v. *Wyman*, 360 U.S. 72 (1959)).

tion," which was "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). In the 1983 case *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), the Court effectively merged free speech and assembly rights into a single analysis—a move followed in later cases like *Boos* v. *Barry*, 485 U.S. 312, 318-19 (1988). As a result of this realignment, cases in which the government's action would hinder the group in communicating a message its members came together to express tended to win (*Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000)), while groups that failed to demonstrate such an impact on their message tended to lose (*Roberts*, 468 U.S. at 621-22).

Throughout this process, freedom of assembly has remained on the sidelines. Indeed, this Court has not decided a freedom of assembly claim in over thirty years. See Inazu, *Liberty's Refuge* at 7 & n.15. And that is a loss, because as we have seen, the right of assembly has provided crucial protection for dissenting and marginalized groups in the past, and could do so again. This Court should take the opportunity presented by this case to re-establish its association jurisprudence on the firmer doctrinal foundation of the Assembly Clause.

B. Many freedoms protected in the Bill of Rights have collective dimensions that are just as protected as their correlate individual rights.

Aside from the standalone right of assembly, many other fundamental liberties contained in the Bill of Rights have an important collective dimension, either exercised through members of groups as individuals or through the group institution itself. "At first glance, the idea of collective rights may appear to be at odds with the liberal tradition, with its strong emphasis on individual rights. Yet the liberal tradition has a communitarian dimension that is generally overlooked."[8] Indeed, scholars have argued that certain collective rights, or the collective exercise of rights, are valuable because they provide options necessary for personal autonomy. Joseph Raz, *Morality of Freedom*, 205-206 (1986). In other words, recognizing the inherent collective dimension of fundamental rights is important not just for protecting the fundamental rights of groups of people, but also in order to provide the greatest possible protection of individual liberty.

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[8] Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 Chi.-Kent L. Rev. 531, 571 (2003).

1. As a practical matter many rights can only be fully exercised if the inherent collective dimension of the right is protected.

As a practical matter, the Bill of Rights contains a number of liberties that "can be fulfilled only on the precondition that certain collective interests are also rights." Dwight Newman, *Collective Interests and Collective Rights*, 49 Am J. of Jur. 127, 158 (2004).[9] In other words, unless we are prepared to abandon critical aspects of many fundamental liberties, the collective dimension of such liberties must also be protected. *Id.* at 162-63.

For example, scholars have recognized that "any reasonable understanding of the moral right to freedom of religion must encompass its collective dimension." Newman, 49 Am J. of Jur. at 159-160. Freedom of religion has not been consigned to the "right of an individual to go into a closet and worship alone." *Id.* at 160 (quoting Vernon Van Dyke, *Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought*, 44 Journal of Politics 21, 27 (1982)); *see also* Johan D. van der Vyver, *The Relationship of Freedom of Religion or Belief Norms to Other Human Rights*, *in* Facilitating Freedom of Religion or Belief: A Deskbook 85, 87 (Tore Lindholm et al., eds., 2004) (van der Vyver) ("Freedom of religion or belief cannot prosper on its own: it requires protection of collateral

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[9] See also Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (2011).

rights such as freedom of expression and of assembly.").

In fact, a view of religious exercise focused exclusively on the individualistic nature of religion would denigrate a variety of faith traditions which emphasize communal worship or other communal religious activities. Newman, 49 Am J. of Jur. at 160 (citing Charles Taylor, *Varieties of Religion Today: William James Revisited* (2002)). One cannot make a minyan, perform a baptism, preach a sermon, conduct Friday *jum'ah* prayers, or take *amrit* without involving more than just one person. Similarly, in many Native American faith traditions, adherents frequently gather together for prayers and rituals. See Kristen A. Carpenter, *Real Property and Peoplehood*, 27 Stan. Envtl. L.J. 313, 337 (2008). As an illustration, the "entire community participate[s]" in the Hopi Katsinam ceremonies." *Id.* at 373. Thus, the "the individual right to freedom of religion presupposes the fulfillment of certain collective interests of religious collectives." Newman, 49 Am J. of Jur. at 161.

The collective dimension to rights in the Bill of Rights is by no means limited to the free exercise of religion. For instance, "[a]n individual's freedom of speech presupposes a societal context where speech can matter." Newman, 49 Am J. of Jur. at 161.[10] "An

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[10] See also Heyman, 78 Chi.-Kent L. Rev. at 573 ("[F]ree speech itself has traditionally been understood in part as a right of the community as a whole. * * * [I]n the eighteenth-century libertarian tradition, free speech was not only an inalienable right of individuals, it was also a right that the people as a whole retained when they established a government—a right that was essential if they were to

individual right to vote presupposes the relevant community's ability to be self-determining * * *." *Ibid.* And other rights, such as the right to counsel or the right to a jury, by definition cannot be exercised without more than one person involved.

These examples demonstrate that "[c]ertain individual rights thus cannot be separated from collective rights. Rights are interdependent." Newman, 49 Am. J. Juris. at 162. As such, "*some* collectivity necessarily has to have a collective right if we are to make sense of certain individual rights." *Ibid.*

2. This Court has consistently recognized the collective dimension inherent in many fundamental rights.

This Court has consistently recognized the collective dimension of fundamental rights in at least two contexts: 1) rights exercised by individuals in concert with others, and 2) rights exercised by institutions or groups themselves.[11]

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supervise the government and to exercise their own political rights within a representative system.").

[11] van der Vyver at 90 ("A distinction should be made * * * between collective group rights and institutional group rights. A *collective group right* is afforded to individual persons belonging to a certain category, such as children, women, or ethnic, religious and cultural minorities. The right of a religious community to peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion thus belongs to every member of the group and can be exercised separately, or jointly with any other member(s) of the group. * * * Whereas a collective group right vests in individual mem-

a. This Court has protected individual rights exercised collectively in concert with others.

Many of this Court's precedents implicitly recognize the collective dimension of rights exercised by individuals in concert with others. For example, in *Wisconsin* v. *Yoder*, this Court protected the right of an Amish community to educate their children within their community, rather than be subject to the compulsory school attendance law. 406 U.S. 205 (1972). The *Yoder* plaintiffs were "members of the Old Order Amish religion." *Id.* at 207. The Court spent time analyzing the "way of life" of the Amish collective, and the way in which the law at issue would disrupt the formation of "the Amish religious community." *Id.* at 210-12. Indeed, this Court's holding was explicitly based both on the individualistic "psychological harm to Amish children," as well as the risk of the "destruction of the Old Order Amish church community as it exists in the United States today." *Id.* at 212. The reasoning in *Yoder* thus recognized that the free exercise rights at issue were necessarily being exercised by individuals as members of a collective, and protecting the collective dimension of the rights was necessary to fully protect individual rights.

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bers of a community of people bound together by, for example, a particular national or ethnic, linguistic, or religious allegiance, an *institutional group right* vests in a social institution as such and can only be exercised by that collective entity through the agency of its authorized executive organs.").

And in *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, this Court held that an ordinance prohibiting door-to-door solicitation violated the First Amendment of speech, freedom of the press, and religious exercise for a group of Jehovah's Witnesses. 536 U.S. 150, 153, 166-69 (2002). This Court observed that the city's ordinance created a burden for many types of groups, including religious groups, labor organizations, and any of "the poorly financed causes of little people" who sought "the dissemination of opinion" at "the homes of the people." *Id.* at 162-63. Thus, the collective nature of these First Amendment rights, which required the audience available through door-to-door canvassing, was determinative in this Court's decision.

These precedents illustrate this Court's recognition that to afford full protection to many of the fundamental liberties set forth in the Bill of Rights, courts must protect the collective exercise of those rights by individuals as members of groups.

b. This Court has protected collective rights exercised by private institutions.

In addition to recognizing the collective dimension of rights exercised by individuals as a member of a group, this Court has also recognized the collective dimension of rights exercised by institutions or groups as a stand-alone entity. For example, in *Kedroff* v. *St. Nicholas Cathedral*, this Court recognized "a spirit of freedom for religious organizations" that included "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 344 U.S. 94, 116 (1952). As one scholar explained,

> The heart of the pluralistic thesis [in *Kedroff*] is the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.[12]

This Court recently reaffirmed the longstanding principle that the First Amendment prohibits government interference "with the internal governance of the church," or "the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 132 S. Ct. 694, 706 (2012). Justice Alito and Justice Kagan noted that such protection is justified in part because throughout history, "religious bodies have been the preeminent example of private associations that have acted as critical buffers between the individual and the power of the State." *Id.*

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[12] Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 91 Harv. L. Rev. 67, 91 (1953); see also *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 708-09 (1976); *Maryland & Virginia Eldership of Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 449 (1969); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871).

at 712 (Alito, J. concurring) (internal quotation marks and brackets omitted).

In addition to religious freedom, courts have recognized that private institutions enjoy a wide range of additional constitutional rights, including the freedom of speech,[13] the Fourth Amendment right to be free from unreasonable searches and seizures,[14] a Fifth Amendment right against double jeopardy[15] and takings,[16] a Sixth Amendment right to counsel,[17] and a Seventh Amendment right to a jury.[18] Indeed, under our constitutional framework this Court has explained that courts should begin by assuming that a right applies to private institutions, and only refrain from providing protection if the right is so "purely personal" that an exception applies. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 778 n.14 (1978).

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[13] *Pacific Gas and Electric Co.* v. *Public Utilities Comm'n of California*, 475 U.S. 1, 16 (1986).

[14] *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311 (1978).

[15] *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 565, 575 (1977).

[16] *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489 (1931).

[17] *United States* v. *Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979).

[18] *Ross* v. *Bernhard*, 396 U.S. 531, 532–33 (1970); *United States* v. *R.L. Polk & Co.*, 438 F.2d 377, 378-80 (6th Cir. 1971).

3. International human rights instruments and precedents—including those the United States is party to—protect the collective exercise of human rights.

International human rights law also regularly recognizes the collective dimension inherent in various human rights, both as a collective group right and at the institutional level.

a. International human rights law protects individual rights exercised collectively in concert with others.

The standard-setting international norm on freedom of religion or belief is found in Article 18 of the Universal Declaration of Human Rights (UDHR), 1948, which provides:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or *in community with others* and *in public* or private, to manifest his religion or belief in teaching, practice, worship and observance.[19]

Under this instrument, an individual's right to religious freedom includes the right "to associate * * * with the institutional structures of one's religion." van der Vyver at 87.

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[19] Universal Declaration of Human Rights, art. 18, G.A. Res. 217A, U.N. GAOR, 3rd. Sess., Pt. 1, at 71, U.N. Doc. A/810 (1948) (emphases added) (UDHR).

The ICCPR, the leading international human rights treaty to which the United States is a party, likewise protects the "freedom, either individually *or in community with others and in public or private*, to manifest his religion or belief in worship, observance, practice and teaching."[20]

The European Court of Human Rights has also observed that "the right of believers to freedom of religion, which includes the right to manifest one's religion *in community with others*, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention."[21]

In the context of the freedom of opinion and expression, the UDHR includes the "freedom to * * * seek, receive and impart information and ideas through any media and regardless of frontiers."[22] Such a freedom of receiving and imparting ideas necessarily implies freedom being exercised by more than one person.

A number of countries have upheld the importance of the collective exercise of individual liberties. The South African Constitution, for instance, recognizes the communal context required for the full exercise of many important human rights. It provides

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[20] ICCPR, art. 18.1, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (emphasis added).

[21] Newman, 49 Am J. of Jur. at 160-61 (quoting *Case of Metropolitan Church of Bessarabia* v. *Moldova*, App. No. 45701/99, 35 Eur. Ct. H.R. 13 (2002) (emphasis added)).

[22] UDHR Art. 19.

that "[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community," to "practice their religion" or "to form, join and maintain cultural, religious and linguistic *associations* and *other organs of civil society*."[23]

These international rights, exercised by individuals in relation to group membership or activity, offer an important complement to the collective nature of rights exercised by institutions.

b. International human rights law protects collective rights exercised by private institutions.

Human rights instruments from other jurisdictions protect rights exercised by private institutions. The Council of Europe's 1995 Framework Convention for the Protection of National Minorities, for example, recognizes the rights of persons belonging to a national minority "to manifest his or her religion or belief and *to establish religious institutions, organizations, and associations*."[24]

Many countries have also recognized the rights of private institutions, as an agent of members, to receive protection and conduct their affairs without

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[23] van der Vyver at 101 (quoting S. Afr. Const. 1996, Art. 31 (emphasis added)).

[24] van der Vyver at 101 (quoting Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 8, G.A. Res. 47/135, Annex, U.N. GAOR, 47th Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/47/49 (Dec. 18, 1992) (emphasis added)).

state interference.[25] The South African Constitution has been argued as "the most advanced of all human rights instruments in affording recognition to the basic rights and freedoms of group entities such as the institutional church." van der Vyver at 91. The South African Bill of Rights states, "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right," all juristic persons are "entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person." *Id.* (quoting S. Afr. Const., §§ 8(2) & 8(4)). Likewise, Article 19 of Germany's constitution makes clear that "[t]he basic rights apply also to corporations established under German Public law to the extent that the nature of such rights permits."[26]

The European Court of Human Rights has also recognized that protecting religious institutions is critical for the exercise of religious freedom generally. The court has noted that "religious communities tra-

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[25] One scholar has argued that the first modern formulation of this principle was articulated by a medieval Calvinist jurist, John Althusius, who proclaimed that all distinct social entities are governed by their own laws and that those laws differ according to the nature of the social institution. van der Vyver at 95-96. Dutch political scientists and legal philosophers schooled in Calvinist social theories were influential in expanding the application of private spheres of sovereignty to the interrelationships of all "structural social entities." *Id.* at 96.

[26] Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law] [Constitution], May 23, 1949.

ditionally exist in the form of organised structures," and thus the Convention "safeguards associative life against unjustified State interference." Moreover, "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords."[27]

Protection of such institutional rights is thus justified, as both this Court and international scholars have recognized, because "furtherance of the autonomy of religious organizations often furthers religious freedom as well." van der Vyver at 97 (quoting *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 342 (1987)).

II. The Constitution protects Officer Heffernan's right to act in concert with others.

Officer Heffernan should prevail against Respondents under both the Assembly Clause and the collective dimension of freedom of speech. Each would be separately sufficient to rule in favor of Officer Heffernan.

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[27] Newman, 49 Am J. of Jur. at 160-61 (quoting *Metropolitan Church of Bessarabia* v. *Moldova*, App. No. 45701/99, (2002) 35 EHRR Eur. Ct. H.R. 13) (ECHR)).

A. The Assembly Clause protects Officer Heffernan's right to interact with a political campaign even if he does not share its goals.

At the core of the Assembly Clause is the principle that citizens must have a right to gather together without undue government interference. This is true even when the government does not understand or properly perceive the purpose of the gathering, or even when there is no single, official purpose common to all those attending the gathering or participating in the collective activity.

First, it should not matter whether there is some "official" purpose of the assembly in question. Some may gather to hear a Joan Baez protest concert because they strongly agree with the political message of the lyrics. Some may attend merely because they love the music. Some may go there looking to find a date. But that disunity of purpose does not mean that the government then has free rein to interfere with the gathering or that the concertgoers have waived their rights under the Assembly Clause. Put simply, the Third Circuit was wrong to suggest that associational activity is only protected through formal affiliation with a group consisting of a single unitive or "official" expressive purpose in order to enjoy First Amendment protection. Cf. *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 476 (2009) (it is frequently "not possible to identify a single 'message' that is conveyed by an object or structure").

Indeed, it is often true of crucial assemblies in world history that their purpose and direction is only determined during the course of the assembly. The

delegates to the Second Continental Congress did not initially share the same objectives, nor had they predetermined their ultimate purpose in American history: the fashioning of the Declaration of Independence. Sometimes an assembly is called in order to determine a common purpose.

Since it is difficult and somewhat pointless to find out the purpose of an assembly, it should matter even less whether government officials interfering with an assembly properly perceive the assembly's purpose. Nor should the scope of protection depend on a judge's *post-hoc* decision about the purpose of the assembly. Rather, the Founders recognized that people assembling together is an activity deserving of protection, regardless of the assembly's purpose.

Here, Officer Heffernan was gathered together with members of a political campaign. The Founders would have recognized that as an assembly, regardless of their unfamiliarity with yard signs or their inability to tell whether Officer Heffernan completely shared the goals of the leaders of the political campaign. That should be enough for him to invoke his rights under the Assembly Clause.[28]

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[28] Claims under the Assembly Clause are like other First Amendment rights subject to strict scrutiny, but the interest Respondents sought to further here—the punishment of opposing political views—is not even legitimate, much less compelling.

B. The collective dimension of freedom of speech protects Officer Heffernan's right to pick up yard signs from a political campaign even if he does not share its goals.

As we demonstrated above, freedom of speech has an inherent collective dimension. Under that collective dimension, freedom of speech extends not just to the actual speaker or a lead speaker, but also to those listening to the speaker or facilitating the speaker, even if they do not necessarily share the views of the primary speaker.

For example, on November 4, 1917, the All-Russian Central Executive Committee issued a decree giving the Bolsheviks control over all newsprint in Russia. See Tovah Yedlin, *Maxim Gorky: A Political Biography* 124 (1999). Opposition newspapers quickly folded. *Id.* Russian newsprint manufacturers or newsprint distributors might not have shared or even known the views of the Bolsheviks' political opponents, but the Soviet government violated their freedom of speech nevertheless.[29] Indeed, it was precisely because of their participation in the collective dimension of speech that the Bolsheviks targeted them in the first place.

Yet under the Third Circuit's approach, Officer Heffernan—who sought to facilitate both his mother's

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[29] See also *Minneapolis Star & Tribune* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (holding that a law singling out newspapers for a tax on paper and ink was an unconstitutional burden on expression).

speech and the speech of a political campaign—enjoyed no freedom of speech protections. Without a "political message" he intended to convey, Officer Heffernan was out of luck. Pet. App. 10a. Indeed, under the Third Circuit's misguided approach, Russian newsprint manufacturers would have been out of luck too. The Court should soundly reject this crabbed view of the collective dimension of freedom of speech.

* * *

Officer Heffernan's travails before the lower courts should serve as a wake-up call for civil libertarians. Constitutional doctrine that is severed from the text and history of the Constitution leads to shrunken freedoms, and eventually absurd results. The Court should take the opportunity presented by this case to put freedom of assembly in particular and collective rights in general on a firmer foundation.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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In The Supreme Court of the United States

JEFFREY J. HEFFERNAN,
Petitioner,

v.

CITY OF PATERSON, MAYOR JOSE TORRES, and POLICE CHIEF JAMES WITTIG,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

Amicus curiae the National Association of Government Employees (SEIU/NAGE) is a labor organization with thousands of members throughout the United States. SEIU/NAGE is affiliated with the Service Employees International Union. SEIU/NAGE represents public and private workers at every level of government—federal, state, county, and municipal—across a range of professions, including police officers, firefighters, correctional officers, nurses, paramedics, emergency medical technicians, office workers, and professional workers.

SUMMARY OF ARGUMENT

A longstanding principle in the American legal system is that the law should be clear. Clarity is a cornerstone of our legal system because individuals need fair notice of what is prohibited so they can appropriately conform their conduct to the requirements of the law. Courts have repeatedly

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[1] Each party has consented to the filing of this brief by lodging blanket written consents with the Clerk of the Court. Pursuant to this Court's Rule 37.6, Amicus states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than Amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

applied this principle to penal laws, civil laws, regulations, and judicially created doctrines.

Where the government is acting as employer, the rules dictating what conduct can result in adverse employment actions should likewise be clear to provide notice to public employees of how to avoid such penalty. The rule adopted by the Third Circuit, which allows a government employer to take adverse employment actions against a public employee based on the employer's misperception of the employee's political association, fails to provide the clarity necessary to allow public employees to properly conform their conduct. Thus, the Third Circuit rule contradicts the long-standing principle requiring clarity in the law prior to adverse government action and should be rejected by this Court.

Clarity is also an essential requirement for rules implicating First Amendment freedoms as unclear rules chill protected speech and activities. When the boundaries of a rule are unclear, regulated individuals will avoid conduct well outside of the actual scope of the rule in order to avoid penalty. The Third Circuit rule has such a chilling effect on public employees' conduct. The lack of clarity leaves public employees guessing as to which activities could cause a supervisor to

misperceive their political associations, and leaves them without a remedy for any resulting adverse employment actions. This uncertainty pushes public employees to curtail protected conduct and thus impermissibly chills protected activities.

In addition, the lack of clarity in the Third Circuit rule reduces government efficiency because the rule encourages mistrust and insecurity in the government workplace. Well-documented research shows that employees who are more secure in their jobs perform better at work. Under the Third Circuit rule, the government workplace is less productive because public employees fear supervisors' perceptions of their political associations and potential adverse actions that may flow from these misperceptions. Thus, the decision below threatens the government's ability to efficiently administer public services.

ARGUMENT

I. The Third Circuit Rule Runs Counter to Our Judicial System's Long-Standing Preference for Clarity.

Our judicial system has long insisted on clarity in the law in order to "give the person of ordinary intelligence a reasonable opportunity to

know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Clarity in the law both provides fair warning to regulated individuals and safeguards them against arbitrary or discriminatory enforcement. *Id.* at 108–09.

This Court has often applied this principle in the criminal context as the need for clarity in laws that mete out punishment is "the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Accordingly, this Court has struck down numerous penal statutes for failing to provide adequate notice of their scope. *See, e.g., Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). Further, the insistence on clarity in the law extends beyond criminal law and has been applied in many different circumstances, from reviewing indecent broadcasting regulations, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012), to rules governing attorney conduct, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991).[2] Taken together, these cases establish a

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[2] A review of case law in lower courts further reveals the myriad contexts in which clarity in the law has been enforced. *See, e.g., Cunney v. Bd. of Trs. of Grand View*, 660 F.3d 612, 621 (2d Cir. 2011) (striking down a zoning statute as unclear); *Serv. Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 605 (5th Cir. 2010) (striking down a municipal parade ordinance as unclear); *Cement Kiln Recycling Coal. v. EPA*,

clear principle: in order for the government to take lawful adverse action against an individual, the rules demarcating what actions may result in a penalty must be clearly ascertainable.

This principle should apply with equal force in the public employment context. Public employees should not be subject to the risk of punishment based on a rule that does not apprise the employees of what conduct is protected. Thus, the Court's concern for preventing adverse government action under unclear rules is pertinent in determining when government employers may take adverse employment action against public employees.

Well-established precedent from this Court dictates that a government employer may not retaliate against a public employee on the basis of that employee's political affiliation. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).[3] The

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493 F.3d 207, 222–24 (D.C. Cir. 2007) (upholding a hazardous waste permit regulation as clear); *Slavin v. United States*, 403 F.3d 522, 523–24 (8th Cir. 2005) (upholding a prohibition on interstate transportation of fighting birds as clear); *Families Achieving Indep. & Respect v. Neb. Dep't of Soc. Servs.*, 111 F.3d 1408, 1415–16 (8th Cir. 1997) (upholding a policy regarding access to public benefits office lobbies as clear); *Armstrong v. D.C. Pub. Library*, 154 F Supp. 2d 67, 81 (D.D.C. 2001) (striking down a regulation of library patrons as unclear).

[3] Of course, there is an exception for certain positions where "party affiliation is an appropriate requirement," *see*

rule adopted by the Third Circuit below, however, permits such retaliation when driven by the employer's misperception of an employee's political affiliation. As a result, the Third Circuit rule fails to provide adequate notice to regulated individuals—both employers and employees—concerning what conduct is protected. Government employers are hard-pressed to know what actions are actually proscribed under this rule because, by definition, employers do not know when they are mistaken.[4] Likewise, public employees are left guessing as to how any one action will be perceived by an employer and, as a result, whether such action is protected. Thus, the Third Circuit rule is impermissibly unclear.

Furthermore, as is particularly relevant in this case, this Court has explicitly identified the importance of clarity in the law as it relates to First Amendment freedoms. As this Court explained in *Grayned*, "where a vague statute 'abuts upon sensitive areas of basic First Amendment

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Rutan, 497 U.S. at 64, but such an exception is not at issue in this case.

[4] This Court has previously acknowledged that, where the government acts as employer, the most efficient rule to apply when analyzing potentially retaliatory actions is one which focuses on what the employer "reasonably believes" to be the situation. *Waters v. Churchill*, 511 U.S. 661, 682 (1994) (Souter, J., concurring).

freedoms,' it 'operates to inhibit the exercise of those freedoms.'" 408 U.S. at 109 (internal brackets omitted) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) and *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961)). Thus, "rigorous adherence to th[e] requirements" for constitutionally sound clarity is particularly necessary where the First Amendment is implicated. *Fox*, 132 S. Ct. at 2317. The pervasiveness of the long-standing constitutional principle of clarity in the law—and its amplified importance in the First Amendment context—illustrates why the Third Circuit's unclear rule should not stand.[5]

II. The Lack of Clarity in the Third Circuit Rule Chills Public Employees' First Amendment Associational Rights.

Lack of clarity in the law chills protected activity and fails to allow First Amendment rights the "breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). This is because, when

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[5] That the majority of this Court's decisions discussing clarity in the law involve interpreting statutes or regulations is of no moment. Whether it is congressionally legislated statutes or judicially decided opinions, the effect on regulated individuals is the same: unclear rules explaining the scope of the law prevent fair warning and can chill First Amendment freedoms.

individuals are faced with unclear rules, they inevitably "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked," *Grayned*, 408 U.S. at 109 (internal quotation mark and ellipsis omitted), in order to ensure their compliance with the law. Therefore, speech is chilled because of the speaker's concern that such speech may result in negative consequences—even when the speech is protected and such a concern is ultimately unfounded. This chilling effect runs counter to the purpose of the First Amendment. *Fox*, 132 S. Ct. at 2317 ("When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278–79 (1964).

Rules implicating First Amendment freedoms are required to meet a heightened standard of clarity exactly because of the concern that a lack of clarity in the law will chill protected speech. *Fox*, 132 S. Ct. at 2317; *Smith v. Goguen*, 415 U.S. 566, 573 (1974). First Amendment rights are "delicate and vulnerable, as well as supremely precious in our society." *Button*, 371 U.S. at 433. Therefore, "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly

inform what is being proscribed." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967).[6]

The need for clarity in rules implicating the First Amendment is equally important in the context of public employment. Public employees who are unsure of whether particular speech or actions are protected will be motivated to stifle their own conduct in order to avoid adverse employment actions that may result from unprotected speech. The speech and association of public employees will therefore be impermissibly chilled as employees may avoid large swathes of protected First Amendment activity out of fear that it falls within the wide "danger zone" of an unclear employment rule. *See Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

The concern that an unclear rule would impermissibly chill public employees' exercise of their First Amendment rights was the animating principle behind this Court's decision in *Keyishian v. Board of Regents*. There, after refusing to sign

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[6] Concern for protecting First Amendment freedoms has also prompted this Court to carve out an exception to its usual preference for abstaining from ruling on state laws' constitutionality before state courts have interpreted them, explaining that delay in waiting for a state court to interpret a statute poses too great a threat to First Amendment freedoms. *E.g.*, *City of Houston v. Hill*, 482 U.S. 451, 467–68 (1987).

loyalty oaths, three university faculty members and one employee faced dismissal under a New York statute allowing removal of public officials for "treasonable or seditious act[s]." *Keyishian*, 385 U.S. at 591–93. In invalidating the statutory scheme as insufficiently clear, this Court emphasized that the law did not reasonably apprise teachers of what speech or activities could expose them to dismissal. *Id.* at 599 ("The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts."). As a result, the Court was concerned that such uncertainty would impermissibly chill speech, as "[w]hen one must guess what conduct or utterance may lose him his position," he will avoid engaging in behavior well outside the prohibition's actual scope. *Id.* at 604. Thus, the Court held that the statutory scheme's "extraordinary ambiguity" unconstitutionally chilled First Amendment freedoms. *See id.* Moreover, the lack of clarity was dispositive despite New York's recognized compelling interest in preventing subversion. *Id.* at 602.

Under the Third Circuit rule, public employees are compelled to engage in the same guessing game as the public employees in *Keyishian*. Any employee action that might possibly be misperceived as indicating a political association

carries the risk that an employer may take an adverse employment action against that employee. Public employees are left to theorize which seemingly innocuous activities could prompt an adverse employment action, were such activities to be misinterpreted by a supervisor as counter to their own political associations. For employees faced with this dilemma, silence is the only practical solution.

This effect is especially burdensome for employees whose views on specific issues diverge from their political affiliation. For instance, a lifelong Democrat is likely to hide her pin that reads, "Climate change is a hoax," worried that her supervisor might misperceive her as a Republican and demote her on that basis. She could not be demoted for her protected speech of wearing the pin or for her actual political affiliation as a Democrat, *Rutan*, 497 U.S. at 73–76, but the Third Circuit rule leaves open the possibility that her demotion for her misperceived political affiliation as a Republican is lawful. Such employees are caught in a catch-22: if the lifelong Democrat's views on climate change become known, she risks being misperceived as a Republican; on the other hand, if her affiliation with the Democratic Party becomes known, she risks being misperceived as supporting positions that she may strongly oppose. In either

case, her views could be misperceived as supporting a political position she does not actually maintain. A public employee in this position is pressured to stifle any expression of political views in order to avoid such a predicament.

Beyond the workplace, the Third Circuit rule also has the potential to chill even private speech and behavior. Under the Third Circuit rule, anything a public employee says or does outside of the workplace that is witnessed by a coworker or supervisor could be misperceived as behavior indicative of a political association. *Cf. Keyishian*, 385 U.S. at 599 ("Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy?"). Indeed, that is what happened to Petitioner. Private conduct within public employees' homes in the presence of guests could produce the same result. A public employee is therefore motivated to stifle his or her speech in practically all arenas of his or her life to avoid creating the impression (correct or not) of political associations that could subject the employee to adverse employment actions. Such chilling of private speech is offensive to the First Amendment. *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 532–33 (2001) (stating the chilling of private speech implicated important constitutional concerns).

The chilling of public employees' private conduct is particularly concerning in light of this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In *Garcetti*, this Court held that although a public employee's speech in his official capacity did not enjoy First Amendment protection, his speech as a private citizen was protected. *Id.* at 421–23. The Court found that the protection of such private speech was in the public interest, as it ensured the public would "receiv[e] the well-informed views of government employees engaging in civic discussion." *Id.* at 419. Here, even though Petitioner was off-duty and outside of the workplace when he picked up the campaign sign for his mother, this action nonetheless led his employer to misperceive that he supported a political candidate. In holding that Petitioner's employer acted lawfully in demoting him on the basis of false perceptions, the Third Circuit rule compels public employees to curtail associative behavior even when they are away from the workplace, as employees are unsure what behaviors will be protected. [7]

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[7] The lack of clarity in the decision below could also have the effect of coercing disclosure. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding compelled speech to violate the First Amendment). To avoid risking misperceptions, public employees possessing political beliefs similar to their supervisors might feel pressured to

The lack of clarity in the Third Circuit rule also harms open-minded and undecided public employees because it discourages them from gathering political information. A curious public employee caught watching a political party's primary debate or reading a particular periodical in the breakroom risks a supervisor's misperception of that employee's political association. When merely educating oneself could result in punishment, a public employee is less likely to self-inform. Rules that discourage information gathering, such as the Third Circuit rule at issue here, chill the First Amendment right to read and receive information and, in the process, weaken the electorate. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 866–68 (1982); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

In sum, the lack of clarity in the Third Circuit rule chills an array of public employees' associative behavior, including workplace conduct, private behavior outside of the workplace, and political information gathering. Without clarity regarding which behaviors and speech are

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preemptively disclose their political associations in order to preclude misperception and potential adverse action. In such workplaces, silence may not be a viable option. Thus, the lack of clarity in the Third Circuit rule might also impermissibly intrude on an employee's fundamental "right to refrain from speaking at all." *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

protected, public employees will reasonably choose silence. A rule with such corrosive influence on the speech of public employees flies in the face of the axiom that "First Amendment freedoms need breathing space to survive." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007). The Third Circuit rule allows for no such breathing space.[8]

III. The Lack of Clarity in the Third Circuit Rule Promotes Inefficiency in the Government Workplace.

The Third Circuit rule works to the detriment of both public employers and employees by negatively affecting the workplace. Unclear and unpredictable employment rules promote employee insecurity, thereby decreasing workplace efficiency and hampering employers' efforts to foster productive work environments. Adopting a clear rule protecting employees from retaliation based on either actual or misperceived association will prevent this inefficiency.

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[8] In fact, the District Court concluded as much in granting summary judgment to Respondents in this case. *See Heffernan v. City of Paterson*, 2 F. Supp. 3d 563, 583 (D.N.J. 2014) ("Might the Third Circuit approach permit employers to intimidate employees into avoiding anything that might even be *mis*construed as political speech or affiliation? The [contrary Sixth Circuit] approach seems designed to afford the First Amendment breathing space.").

This Court has repeatedly recognized the value of efficiency in the administration of public services. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). In particular, when evaluating whether a restriction on the speech of public employees is constitutionally sound, this Court analyzes whether the restraint "arrive[s] at a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of public services " *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465–66 (1995) (internal brackets omitted). Unsurprisingly, work environments are more productive when employees feel that their employment is secure; a strong sense of security is an important positive factor in employees' trust in management, which in turn is an important component of productivity. *See* Rachel Clapp-Smith, Gretchen R. Vogelgesang & James B. Avey, *Authentic Leadership and Positive Psychological Capital: The Mediating Role of Trust at the Group Level of Analysis*, 15 J. Leadership & Organizational Stud. 227, 231 (2009) (examining the role that high levels of trust in management plays in improving employees' psychological capital and work performance). Conversely, workplaces with insecure employees fall short of their optimal levels of productivity. *See id.* Insecurity also leads

to workplaces with disengaged employees, while engaged employees are more productive and perform comparatively well across a variety of metrics. *See, e.g.*, James K. Harter, Frank L. Schmidt & Theodore L. Hayes, *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*, 87 J. Applied Psychol. 268 (2002).

The lack of clarity in the Third Circuit rule erodes public employees' sense of security and trust because employees are concerned about how their actions will be perceived by supervisors and whether such perceptions will result in detrimental consequences. *See supra* Part II. Thus, the Third Circuit rule will lead to less productive government workplaces and a less efficient administration of public services from those workplaces.[9] Furthermore, unlike cases concerning a balancing of public employees' right to free speech with government efficiency, *see, e.g.*, *Nat'l Treasury Emps. Union*, 513 U.S. at 465–66; *Pickering*, 391 U.S. at 568, there is no balancing to be done here; the Third Circuit rule both curtails public employees' freedom of association *and* results in

[9] This reduction in trust and security could also lead to other costs for government employers, such as increased turnover or additional investment in employment retention programs, further compounding the resulting inefficiency by diverting resources from administration of public services.

less efficient administration of public services. Accordingly, the lack of clarity in the Third Circuit rule leads to a workplace that is both undesirable for employees and unproductive for employers.

CONCLUSION

This Court should reject the Third Circuit rule because it contradicts our judicial system's age-old principle of providing regulated persons with clear notice of prohibited conduct. Under the Third Circuit rule, public employees are unsure which activities could result in adverse employment action because they cannot reasonably anticipate how a supervisor may perceive the political motivations of a particular activity. This uncertainty pressures public employees to self-censor both inside and outside the workplace. The lack of clarity in the Third Circuit rule not only chills First Amendment freedoms of public employees, it also lessens public employees' sense of security in their employment, leading to decreased trust in management and, ultimately, diminished efficiency in government workplaces. These consequences for public employees and government workplaces warrant a clear rule which prohibits all politically motivated workplace reprisals. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Petitioner,

v.

CITY OF PATERSON, NEW JERSEY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, AND NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici are not-for-profit organizations whose mission is to advance the interests of state and local government officials and thereby ensure the smooth functioning of state and local government. *Amici* monitor and analyze legal developments that have a distinct impact on the business of state and local governments, and they take positions advocating for greater protection of government officials as they serve the public good.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cas-

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Petitioner and Respondents have filed a blanket consent with this Court to the filing of all *amicus* briefs.

es, like this one, that raise issues of vital state concern.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 ap-

pointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The International Public Management Association for Human Resources ("IPMA-HR") rep-

resents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

This case directly impacts the interests of *amici* and their members. States, as well as their agencies and municipalities, are increas-

ingly burdened by the threat of litigation arising from First Amendment claims brought by government employees. State and local governments are collectively one of the nation's largest employers and will be faced with significant unanticipated and unbudgeted costs if the decision below is reversed. *Amici* have a strong interest in ensuring that state and local government employers are able to effectively manage their workplaces, and the Third Circuit's decision supports their ability to do so.

SUMMARY OF ARGUMENT

The undersigned *amici* urge that the Court resist Petitioner's invitation to constitutionalize what amounts to an employee grievance. No constitutionally protected activity occurred in this case. A government employer's mere *perception* that an employee has exercised his First Amendment rights is not equivalent to the employee's actual exercise of those rights. *See* Resp. Br. 8-12.

There are multiple alternate remedies, discussed in detail below, available to such an employee. A web of statutory remedies exists, each of which enjoys innate flexibility and adaptability to voters' evolving views. These include collective bargaining statutes, "just cause" protections, civil service statutes, and statutes protect-

ing against interference or *attempts* to interfere with any individual's civil rights. In addition, many states recognize the availability of a common-law remedy when no other remedies are available: the tort of wrongful discharge in violation of public policy. There is therefore no need to distort First Amendment doctrine to cover the mere perception of constitutionally protected activity when no such activity, in fact, occurred.

Moreover, the Court has long held that a governmental entity may restrict its employees from engaging in political activity in certain circumstances. *See, e.g., United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973). Lower courts have held that the *Elrod-Branti-Rutan* exception to the First Amendment, which applies to various adverse employment actions taken against a government employee if party affiliation is an appropriate requirement for the effective performance of his or her public office, *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990), may also apply to employees whose positions require a heightened need for trust and confidence. If the Court *were* to determine that the First Amendment covers *perceived* First Amendment violations (which it should not), it should then analyze whether a sensitive and confidential position such as that

held by Petitioner should fall within the *Elrod-Branti-Rutan* exception. But the Court need not, and should not, reach that question for all the reasons discussed in Respondent's Brief and in light of all the alternate remedies discussed below.

ARGUMENT

I. THE COURT SHOULD REJECT PETITIONER'S STRAINED ATTEMPT TO EXPAND THE FIRST AMENDMENT IN LIGHT OF THE OTHER PROTECTIONS AVAILABLE TO GOVERNMENT EMPLOYEES.

An assortment of non-Constitutional remedies is available to address an adverse employment action taken by a government employer against its employee due to the employer's *mistaken* belief that the employee exercised his First Amendment rights. *See Waters v. Churchill*, 511 U.S. 661, 670 (1994) ("[N]ot every procedure that may safeguard protected speech is constitutionally mandated."). Collective bargaining agreements, codes, and reporters contain statutory and common-law remedies that serve to protect a government employee in such a circumstance. Statutory remedies also enjoy flexibility to adapt to the changing interests advanced by the public through their elected representatives. Inasmuch as the Court's "usual

practice is to avoid the unnecessary resolution of constitutional questions," *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009), and other remedies exist, the Court should reject Petitioner's request for a new, analytically incoherent, constitutional cause of action.

A. Government Employees Enjoy Statutory Protections.

Most public employees are protected by statutory procedures applicable to their jurisdictions. Most states authorize collective bargaining for state and local government authorities. Either through such agreements or through statutory protection, most state and local government employees may not be disciplined or terminated but for just cause. It seems unlikely that an arbitrator or a personnel review board would conclude that an employer's misperception of anything, much less employee political speech, amounts to "just cause."

1. Collective Bargaining Laws

Collective bargaining laws enable employees to negotiate appropriate employment protection tailored to their experience with and understanding of their work environment. Unlike the First Amendment, which is effectively invoked

in the employment context only in a circumscribed set of circumstances, collective bargaining statutes are written and enacted with the express purpose of safeguarding employees' rights in the workplace. The resulting collective bargaining agreements can and do provide employees with ample resources to prevent, contest, and seek full remedy for unjust adverse employment actions.

The vast majority of states and the District of Columbia, as well as many municipalities, have enacted some form of public sector collective bargaining laws which require public employers to negotiate with their employees over the terms and conditions of their employment, affording employees the opportunity to protect themselves against unjust adverse employment actions. *See, e.g.*, ALASKA STAT. § 23.40.070, *et seq.* (Public Employment Relations Act) (requiring public employers to negotiate with and enter into written agreements with employee organizations on terms and conditions of employment); *id.* § 42.40.720, *et seq.* (collective bargaining rights for employees of the Alaska Railroad Corporation); CONN. GEN. STAT. § 7-467, *et seq.* (collective bargaining rights for municipal employees); *id.* § 5-270, *et seq.* (collective bargaining for state employees); *id.* § 10-153a, *et seq.* (codifying teachers' bargaining rights, including

over terms and conditions of employment); DEL. CODE ANN., tit. 19, §§ 1301-1319 (Public Employment Relations Act) (securing bargaining rights for public employees over terms and conditions of employment and establishing review board to resolve disputes arising between public employees and employers); *id.* §§ 1601 1618 (Police Officers' and Firefighters' Employment Relations Act) (granting firefighters and policemen right to organization and representation); *id.*, tit. 14; §§ 4001-4019 (Public School Employment Relations Act) (granting school employees right to organization and representation and establishing public employment relations board to oversee disputes between school employees and boards of education); D.C. CODE §§ 1-617.01, *et seq.* (codifying public employee bargaining rights, including board with authority to reinstate or otherwise make whole the employment or tenure of any employee); GA. CODE ANN. §§ 25-5-1 to 25-5-14 (Firefighter's Mediation Act) (allowing permanent members of any paid fire department of a municipality to bargain collectively concerning wages, rates of pay, and other terms and conditions of employment); HAW. REV. STAT. §§ 89-1 to 89-23 (affording public employees bargaining rights over terms and conditions of employment); IDAHO CODE ANN. §§ 33-1271 to 33-1276 (empowering school district to enter into negotiation agreement with local

education organization representing at least 51% of professional employees); *id.* §§ 44-1801 to 44-1812 (firefighters' bargaining rights over working conditions and all other terms and conditions of employment); 5 ILL. COMP. STAT. ANN. §§ 315/1-315/28 (Illinois Public Labor Relations Act) (granting public employees full freedom of association to organize for purpose of negotiating conditions of employment and other mutual aid or protection); 115 ILL. COMP. STAT. ANN. §§ 5/1-5/21 (Illinois Educational Labor Relations Act) (establishing collective bargaining rights for teachers and Illinois Educational Labor Relations Board); IND. CODE § 20-29-1-1, *et seq.* (collective bargaining rights for teachers including specific right to include grievance procedure in any contract); IOWA CODE §§ 20.1, *et seq.* (Public Employment Relations Act) (establishing public employment relations board with authority to provide remedial relief for violations of the chapter, including reinstatement and back pay); KAN. STAT. ANN. §§ 75-4321 to 75-4339 (purpose of the Public Employer-Employee Relations Act is to enable "public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment"); *id.* §§ 72-5413, *et seq.* (requiring boards of education to recognize and negotiate with teachers' organization); KY. REV. STAT. §

345.010, *et seq.* (recognizing firefighters' bargaining rights related to terms and conditions of their employment and other mutual aid or protection); *id.* § 78.470, *et seq.* (county police bargaining rights); *id.* § 67C.400, *et seq.* (establishing bargaining rights for police in counties with a population of at least 300,000); *id.* § 67A.6901, *et seq.* (establishing bargaining rights for urban-county corrections personnel, firefighters, police officers); ME. REV. STAT. ANN., tit. 26, §§ 1281-1294 (Judicial Employees Labor Relations Act) (establishing collective bargaining rights for judicial employees); *id.* §§ 979 to 979-S (granting state employees collective bargaining rights over terms and conditions of employment); *id.* §§ 1021-1036 (University of Maine System Labor Relations Act) (requiring employers to confer and negotiate in good faith with respect to working conditions and contract grievance arbitration); *id.* §§ 961-974 (Municipal Public Employees Labor Relations Law) (establishing collective bargaining rights for municipal employees, including over the terms and conditions of their employment); MD. CODE ANN., STATE PERS. AND PENS. § 3-101, *et seq.* (codifying collective bargaining rights over terms and conditions of employment for state employees); *id.*, EDUC. §§ 6-401 to 6-411 (establishing collective bargaining rights over terms and conditions of employment for public school teachers); *id.* §§

6-501 to 6-510 (extending collective bargaining rights to "noncertificated" public school employees); MASS. GEN. LAWS ch. 150E, §§ 1-15 (codifying bargaining rights over terms and conditions of employment for employees of the Commonwealth and any county, city, town, district, or other political subdivision); MICH. COMP. LAWS. §§ 423.201-423.217 (Public Employment Relations) (provides collective bargaining rights for mutual aid and protection); *id.* §§ 423.231-423.246 (mandatory arbitration over labor disputes for police and firefighters); MINN. STAT. §§ 179A.01 179A.60 (Public Employment Labor Relations Act) ("establishing special rights, responsibilities, procedures, and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer, and the public at large"); MONT. CODE ANN. §§ 39-31-101 to 39-31-505 (Collective Bargaining for Public Employers) (purpose of Act is to "arrive at friendly adjustment of all disputes between public employers and their employees"); *id.* §§ 39-32-101 to 39-32-114 (extending collective bargaining rights to nurses); *id.* §§ 39-34-101 to 39-34-106 (arbitration and collective bargaining rights for firefighters); NEV. REV. STAT. §§ 288.010-288.280 (Local Government Employee-Management Relations Act) (mandating local government employers bargain with local gov-

ernment employees over terms and conditions of employment); N.H. REV. STAT. ANN. §§ 273-A.1 to 273-A.17 (Public Employee Labor Relations) (establishing collective bargaining rights for public employees and board of review); N.J. STAT. §§ 34:13A-1 to 34:13A-43 (granting collective bargaining rights for public employees including police and firemen); N.M. STAT. ANN. §§ 10-7E-1 to 10-7E-26 (Public Employee Bargaining Act) (establishing collective bargaining rights for public employees along with labor relations board); N.Y. CIV. SERV. LAW §§ 200, *et seq.* (Public Employees' Fair Employment Act) (establishing collective bargaining rights for public employees and board of review); N.D. CENT. CODE §§ 34-11.1-01 to 34-11.1-08 (Public Employees Relations Act) (codifying bargaining rights for public employees and, with limited exception, prohibiting restrictions on political activity); OHIO REV. CODE ANN. §§ 4117.01 to 4117-24 (Public Employees' Collective Bargaining) (establishing bargaining rights over terms and conditions of employment and labor board); OKLA. STAT. tit. 70, §§ 509.1-510.2 (school employees and employers must "negotiate in good faith on wages, hours, fringe benefits and other terms and conditions of employment"); OR. REV. STAT. §§ 243.650-243.782 (Public Employee Collective Bargaining Act) (requiring public employers to meet with public employees and nego-

tiate terms and conditions of employment in good faith); 43 PA. STAT. ANN. §§ 1101.101-1101.2301 (Public Employee Relations Act) (establishing collective bargaining rights and labor relations board); *id.* §§ 217.1-217.10 (police and firefighters' right to bargain collectively concerning the terms and conditions of their employment, including working conditions and the right to an adjustment or settlement of grievances or disputes); R.I. GEN. LAWS § 36-11-1, *et seq.* (right to organization for state employees for bargaining purposes over conditions of their employment); S.D. CODIFIED LAWS §§ 3-18-1 to 3-18-18 (collective bargaining rights for public employees over terms and conditions of employment and right to bring grievances regarding same); TEX. LOCAL GOV'T CODE ANN. § 174.001, *et. seq.* (The Fire and Police Employee Relations Act) (collective bargaining rights for firefighters and policemen); VT. STAT. ANN., tit. 3, §§ 901 1008 (State Employees Labor Relations Act) (providing collective bargaining rights over terms and conditions of employment for state employees); *id.*, tit. 21, §§ 1721-1736 (Vermont Municipal Employee Relations Act) (establishing same for municipal employees); WASH. REV. CODE § 41.56.010, *et seq.* (bargaining rights for public employees over terms and conditions of employment); WYO. STAT. ANN. §§ 27-10-101 to 27-10-109 (collective bargaining for

firefighters over pay, working conditions, and all other terms and conditions of employment).

Other than discrimination and retaliation prohibitions arising under labor laws, most collective bargaining statutes do not specify what rights are protected related to employee discipline and dismissal. Instead, those rights are bargained for and are contained in collective bargaining agreements. The following three concepts are contained in most collective bargaining agreements. First, the level of cause required for an adverse employment action; in most agreements, "just cause" is required. *See, e.g.*, Michael L. Wells, *Section 1983, The First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 940 n.4 ("public employee unions typically negotiate rights not to be fired without just cause"). Second, most collective bargaining agreements require progressive discipline, which is often found in the "just cause" provision. For example, unless a workplace violation is particularly egregious, a verbal warning is first required, followed by a written warning, then a suspension, and finally termination. Third, most collective bargaining agreements specify procedures for reviewing adverse employment actions. Typically, employees may grieve adverse employment actions with

the benefit of union representation to a neutral arbitrator who has the authority to overturn the discipline. *See, e.g., Armstrong v. Meyers*, 964 F.2d 948, 950 (9th Cir. 1992) ("Grievance/arbitration procedures [in collective bargaining agreements] are a universally accepted method of resolving employment disputes, included in countless collective bargaining agreements.").

2. "Just Cause" Protections

Many states also provide state and local government employees with statutory protection against discipline or dismissal from employment without just cause, as well as the right to a hearing with an impartial body to contest adverse employment actions. *See, e.g.* ALASKA STAT. § 39.25.170 (right to hearing with State Personnel Board for any employee who is "dismissed, demoted, or suspended for more than thirty days"); ARIZ. REV. STAT. ANN. § 41 783 (right of appeal to the state personnel board seeking relief from dismissal from state covered service, suspension, or involuntary demotion resulting from disciplinary action); COLO. REV. STAT. §§ 24-50-125 (in Colorado, state employees have right to appeal dismissal, suspension, or other discipline to state personnel board); KY. REV. STAT. §§ 78.455, 78.460 (right to review and public hearing for "[e]very action in the

nature of a dismissal, suspension, reduction, or fine made by the chief [of police]"); NEV. REV. STAT. § 245.065 (dismissed county employees entitled to written statement and public hearing to determine the reasonableness of the action); WASH. REV. CODE § 28A.400.300 (limiting discharge of school employees to "sufficient cause").

In California, for example, the State Personnel Board implements and enforces laws governing the employment of "every officer and employee of the state." CAL. CONST. art. VII, § 1. Under article VII of California's Constitution, the Board "shall . . . review disciplinary actions." *Id.* § 3. Many municipal employees in California receive similar protection from personnel laws and boards governing their employment. *See McGraw v. Huntington Beach*, 882 F.2d 384 (9th Cir. 1989) (holding city clerk had property right in employment and reversing summary judgment for city where city charter adopted rules and regulations protecting city employees from suspension, demotion, or dismissal without just cause).

Mississippi is another example of a state with a comprehensive statute delineating the rights of state employees and establishing a State Personnel Board, responsible for promulgating rules and regulations regarding oversight

of state employees. MISS. CODE §§ 25-9-101 to 25-9-155. Pursuant to that statute, state employees cannot be "dismissed or otherwise adversely affected as to compensation or employment status except for inefficiency or other good cause." *Id.* § 25-9-127. A state service employee may also "appeal his dismissal or other action adversely affecting his employment status to the employee appeals board" and ultimately to the courts. *Id.* § 25-9-131.

Regardless of what standard a collective bargaining agreement or statute uses for discipline and discharge, regardless of whether progressive discipline is required by the contract, and regardless of whether a court, a personnel board, or an arbitrator was reviewing the employment decision, it is difficult to believe that a *mistake by the employer* could meet the standard.

3. State Civil Rights Statutes

In addition to the comprehensive protections public employees have under state collective bargaining and state and federal employee personnel laws, most states have enacted a variety of additional statutes providing causes of action for interference with civil rights, including political activity.

Some of these protections are embodied by statutes protecting against interference or *attempts* to interfere with any individual's civil rights. *See, e.g.*, CAL. CIV. CODE § 52.1 (creating a cause of action for "[a]ny individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or by rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with" by a person using threats, intimidation, or coercion); FLORIDA STAT. § 760.51 (civil liability for any person who "attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any other person of rights secured by the State Constitution or laws of this state"); MASS. GEN. LAWS ch. 12 §§ 11H, I (cause of action for interference or "attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth"); N.J. STAT. § 10:6-2 (providing cause of action to anyone who has been deprived of due process, equal protection, substantive rights, privileges or immunities secured by the Constitution or state law, or whose exercise or enjoyment of those rights are interfered with or attempted to be interfered with, by threats, intimidation or coercion by a

person acting under color of law). Although still largely an open question, these statutes arguably provide a cause of action against government employers who *attempt* to interfere with an established right, regardless of whether the employee actually exercised that right.

For example, the Massachusetts Civil Rights Act (the "MCRA") includes a provision that prohibits any interference or *attempt* to interfere with established rights using threats, intimidation, or coercion. MASS. GEN. LAWS. ch. 12 §§ 11H, I. The statute has been invoked by individual public employees seeking a remedy for violation of constitutional rights, even where ambiguity existed regarding the nature of the right asserted.[2] In *Howcrowft v. City of Pea-*

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[2] In addition to private rights of action, the MCRA authorizes the Attorney General to bring civil actions for injunctions or other equitable relief "[w]henever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth." *Id.* § 11H. The Attorney General may do so when a "reasonable [person] would have felt threatened, intimidated, or coerced by the defendants' conduct." *Planned Parenthood League*

body, a police officer brought claims against his supervisors under both 42 U.S.C. § 1983 and the MCRA based on actions taken by his supervisor and coworkers in an attempt to stop the officer's complaints about smoking inside the police station in violation of state law. 747 N.E.2d 729, 733-38 (Mass. App. Ct. 2001). The court concluded that the officer "established a sufficient evidentiary basis to present a genuine issue whether the defendants engaged in a pattern of harassment and intimidation in an *attempt* to suppress [the officer's] free speech rights." *Id.* at 745-46 (emphasis added).

4. State Statutes Prohibiting Discrimination Based on Political Affiliation or Activity

Other states have designed statutes specifically prohibiting discrimination based on political affiliation or activity. The District of Columbia, for example, prohibits discrimination against government employees based on political affiliation. D.C. CODE. ANN. § 2-1402.11. Likewise, North Dakota prohibits discrimination when a government employee participates in lawful activity during non-work hours which

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of Mass., Inc. v. Blake, 631 N.E.2d 985, 991 (Mass. 1994).

is not in direct conflict with the essential business-related interests of the employer. N.D. CENT. CODE §§ 14-02.4-01.

In California, there is a statute in place prohibiting restrictions on firefighters' political activity when not in uniform. CAL. GOV. CODE § 3252. In New Jersey as well, permanent municipal firefighters and police officers cannot be removed from "office, employment or position for political reasons," nor can such firefighters or officers be "suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause." N.J. STAT. § 40A:14-19; *see also id.* § 40A:14-147.

Most government employees thus have available to them a web of federal,[3] state, and local government protections, as well as collective bargaining agreements, that give them a

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[3] Other federal statutory protections exist but are less relevant to the facts presented in this case, such as the Whistleblower Protection Act, 5 U.S.C. §§ 1211-19, 1222, 3352; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; the Equal Pay Act, 29 U.S.C. § 206(d); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.*; the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*; and Sections 501 and 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*

right to continued employment or to protection from adverse employment actions without "cause" or absent narrowly defined circumstances.

These protections vary from state to state, reflecting their percolation through the democratic process. *See Smith v. Robbins*, 528 U.S. 259, 273 (2000) (noting the Court's "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy."). This presents no obstacle, because there is no reason why government employees should be afforded constitutional relief, particularly in the *absence* of the exercise of a constitutional right, when their private employee counterparts are required to rely solely on statutory relief. Moreover, legislatures remain free to enact future statutes if current protections prove inadequate.

B. The Public-Policy Exception to Employment at Will Protects Government Employees in the Absence of Other Remedies.

There are three major common-law exceptions to the employment-at-will doctrine: the public-policy exception, the implied-contract ex-

ception, and the covenant-of-good faith exception. Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LABOR REVIEW 3, 4 (Jan. 2001), http://www.bls.gov/opub/mlr/2001/01/art1full.pdf.

Most states have adopted the public-policy exception to the employment-at-will rule. *See* Genna H. Rosten, Annotation, *Wrongful Discharge Based on Public Policy Derived from Professional Ethics Codes*, 52 A.L.R. 5th 405 (1997); Muhl, *supra*, at 4 (noting that in 2001, "[t]he public-policy exception is . . . recognized in 43 of the 50 States.").

The public-policy exception to employment at will applies when an employee is wrongfully discharged and the termination is against explicit, well-established State public policy. *Id.* Although the doctrine is rarely applied in the context of government employees, the Supreme Court of Washington has held that a state technical college employee could maintain a wrongful termination claim in violation of public policy. *Smith v. Bates Tech. College*, 991 P.2d 1135, 1140-41 (Wash. 2000). The court's discussion occurred in the context of determining whether the tort of wrongful discharge in violation of public policy extends to employees who are terminable only for cause. However, the fact remains that it held that the tort should be ex-

tended to "all employees," which obviously included the state employee in the case. *Id.* at 1141-43.

The Court explained, "in Washington, the tort of wrongful discharge is not designed to protect an employee's purely *private interest* in his or her continued employment; rather, the tort operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy." *Id.* at 1140 (emphasis in original). Because the tort does not arise out of contract, but "rather arises out of the employer's duty to conduct its affairs in compliance with public policy, . . . [i]t logically follows when *any* employee is terminated in violation of a clear mandate of public policy, the employee should be permitted to recover for the violation of his or her legal rights." *Id.* at 1141.

In California, the California Tort Claims Act abolishes all "common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution . . . [or] if a statute . . . is found declaring them to be liable." CAL. GOV. CODE § 815, Legis. Comm. Comments. However, a government employee's wrongful termination in violation of public policy was allowed to go forward because the employee complied with CAL. GOV. CODE §§ 910 & 945.4. *See Stockett v.*

Ass'n of Cal. Water Agencies Joint Powers Ins. Auth., 99 P.3d 500, 501, 505 (Cal. 2004).

New Hampshire has also recognized a cause of action for wrongful termination in violation of public policy. *See Bourque v. Town of Bow*, 736 F. Supp. 398, 403 (D.N.H. 1990). In *Bourque*, the district court allowed a former town employee to proceed with his claim for wrongful termination against the town, explaining that "[i]f, as plaintiff contends, his discharge was politically motivated, public policy is implicated." *Id.* at 403. The court allowed the plaintiff to proceed to trial to prove that he was wrongfully terminated in violation of public policy based on "his failure to provide political support" to a town official running for selectman. *Id.*

Similarly, in Missouri, employees can bring a claim for breach of the implied covenant of good faith and fair dealing based on violation of public policy. *Kmak v. Am. Century Cos.*, 754 F.3d 513, 516-17 (8th Cir. 2014). While not yet considered by the Missouri Supreme Court, a federal district court recently construed Missouri law to permit a municipal employee to bring such an action against the city, despite Missouri's sovereign immunity law barring tort actions, including wrongful discharge, against the state and municipalities. *Smith v. City of Byrnes Mill,* No. 4:14-1220, 2015 U.S. Dist.

LEXIS 103711, at *15-16 (E.D. Mo. Aug. 7, 2015). The court reasoned that "[a]llowing this cause of action gives effect to the implied covenant of good faith and fair dealing that is present in every Missouri contract," as well as "promot[ing] the public policy interest of not permitting city employers 'to discharge employees, without consequence, for doing that which is beneficial to society, while not interfering with the Missouri legislature's decision to protect cities from tort suits through the sovereign immunity statute.'" *Id.* (internal citation omitted).

Courts acknowledge that the public policy exception to the at-will employment doctrine is available in those instances when no other remedies – statutory or otherwise – are available. *See, e.g., Epps v. Clarendon Cnty.*, 405 S.E.2d 386, 387 (S.C. 1991) (recognizing public policy exception to at-will employee doctrine but declining to extend exception where alternative remedy existed for infringed right). The relative infrequency with which public employees resort to this remedy lends further support to *Amici's* position that a safety net of state and federal statutory remedies protecting public employees are already in place and more than sufficient to guard against unjust adverse employment actions.

With both statutory and common-law protections available, expansion of the First Amendment is not only unnecessary but unwise. It would subject government employers to suffocating judicial oversight, "impermissibly 'constitutionaliz[ing] the employee grievance.'" *Enquist v. Oregon Dep't of Agric.*, 553 U.S. 519, 609 (2008) (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)); *cf. Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2496 (2011) ("Unrestrained application of the Petition Clause in the context of government employment would subject a wide range of government operations to invasive judicial superintendence. Employees may file grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations. Every government action in response could present a potential federal constitutional issue. . . . It would also consume the time and attention of public officials, burden the exercise of legitimate authority, and blur the lines of accountability between officials and the public.") (citation omitted). The Court should, once again, be guided by "the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *Enquist*, 553 U.S. at 607 (quoting *Connick*, 461 U.S. at 143). The Court should affirm the Third Circuit's decision.

II. A GOVERNMENT EMPLOYEE'S ABILITY TO ENGAGE IN POLITICAL ACTIVITY IS NOT WITHOUT LIMIT.

In certain circumstances, a governmental entity may restrict its employees from engaging in political activity. In *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), this Court recognized as much when it held that the Hatch Act's provision forbidding federal employees to "tak[e] an active part in political management or in political campaigns" did not violate the First Amendment's guarantee of free speech. *Id.* at 554, 556. Specifically, the Court held that it

> unhesitatingly reaffirm[ed] the *[United Public Workers v.] Mitchell* holding that Congress had, and has, the power to prevent [government employees] from holding a party office, working at the polls, and acting as party paymaster for other party workers. . . So would [an Act of Congress be valid] if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively

> managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate, or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

Id. at 558 (citing *Mitchell*, 330 U.S. 75). The Court "agreed . . . that plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited." *Id.* at 567. Similarly, in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court upheld the constitutionality of an Oklahoma statute containing political restrictions on classified state employees engaged in partisan political activity. *Id.* at 610.

Neither that Oklahoma statute (now repealed) nor the Hatch Act, 5 U.S.C. §§ 7321-7326, is directly applicable to this case;[4] howev-

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[4] The Hatch Act limits certain political activities of most executive branch employees, such as engaging in political

er, the general principles animating those precedents remain relevant.[5]

Moreover, in *Elrod v. Burns*, 427 U.S. 347 (1976), this Court "suggested that policymaking and confidential employees probably could be dismissed on the basis of their political views," and in *Branti v. Finkel*, 445 U.S. 507 (1980), it said that "a State demonstrates a compelling interest in infringing First Amendment rights only when it can show that 'party affiliation is an appropriate requirement for the effective performance of the public office involved.'" *Rutan v. Republican Party*, 497 U.S. 62, 64 n.5 (1990)

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activity while on duty or in the federal workplace, or soliciting or receiving political contributions.

[5] History is relevant as well. *See* EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT 529 (1979) (noting Theodore Roosevelt's refusal, as President of the New York City Police Commission, to change course with respect to the police department's strict enforcement of the Sunday closing laws) ("Personally, I think I can best serve the Republican party *by taking the police force absolutely out of politics*. Our duty is to preserve order, to protect life and property, to arrest criminals and to secure honest elections.") (emphasis added). Like Roosevelt, the Chief of Police's goal was to promote fair elections by requiring that those in his inner circle forbear from active political involvement. This goal does not threaten the First Amendment.

(citing *Elrod*, 427 U.S. at 367 and *Branti*, 445 U.S. at 518). The Court then extended the *Elrod-Branti* holding to apply to promotions, transfers, and recalls after layoffs based on political affiliation. *Rutan*, 497 U.S. at 75.

A portion of the Court dissented, stating that "[s]ince the government may dismiss an employee for political *speech* 'reasonably deemed by Congress to interfere with the efficiency of the public service,' *[United] Public Workers v. Mitchell*, [330 U.S. 75, 101 (1947)], it follows, *a fortiori*, that the government may dismiss an employee for political *affiliation* if 'reasonably necessary to promote effective government.'" *Rutan*, 497 U.S. at 100 (Scalia, J., dissenting) (citing *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980)) (emphasis in original). Concerned about the "shambles" produced by *Elrod* and *Branti*, the dissent used the following example: "A city cannot fire a deputy sheriff because of his political affiliation, but then again perhaps it can, especially if he is called the 'police captain.'" *Id.* at 111 (citing *Jones v. Dodson*, 727 F.2d 1329, 1338 (4th Cir. 1984); *McBee v. Jim Hogg County*, 730 F.2d 1009, 1014-15 (5th Cir. 1984) (*en banc*); *Joyner v. Lancaster*, 553 F Supp. 809, 818 (M.D.N.C. 1982), *later proceeding*, 815 F.2d 20, 24 (4th Cir. 1987)).

Seeking further specificity, the lower courts have held that the *Elrod-Branti-Rutan* line of cases applies not only to government employees who are policymakers, but also to government employees whose positions "require a '*heightened need for trust and confidence* that . . . subordinates are guided by the same political compass and will exercise their discretion in a manner consistent with their shared political agenda.'" *Embry v. City of Calumet City*, 701 F.3d 231, 235 (7th Cir. 2012) (emphasis added) (citation omitted); *see also Gregorich v. Lund*, 54 F.3d 410, 417-18 (7th Cir. 1995).

Specifically, these courts have held that "[p]olitical allegiance is also a valid job requirement when the job 'gives the holder access to his political superiors' confidential, politically sensitive thoughts.'" *Embry*, 701 F.3d at 236 n.1 (citations omitted); *see also Peterson v. Dean*, 777 F.3d 334, 342 (6th Cir. 2015) (discussing one of four categories of positions that fall "with reasonable certainty" under the *Elrod-Branti* exception as "*confidential advisors* who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, *or other confidential employees who control the lines of communications* to category one positions

[named in relevant law as those to whom discretionary authority regarding the enforcement of that law or carrying out of some policy of political concern is granted], category two positions [those to whom a significant portion of total discretionary authority available to category one positions has been delegated] or confidential advisors") (emphases added); *Bland v. ACLU*, 730 F.3d 368, 375 (4th Cir. 2013) (describing process of "examin[ing] the particular responsibilities of the position to determine whether it resembles a policy-maker, *a privy to confidential information*, a communicator, or some other office holder whose function is such that party affiliation [or political allegiance] is an equally appropriate requirement.") (emphasis added).

The Sixth Circuit has described "category three" as "formulated to comport with the discussion in *Branti* indicating that a state governor may 'believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments.'" *Peterson*, 777 F.3d at 349 (quoting *Branti*, 445 U.S. at 518) (citation omitted). This category, the Sixth Circuit continued, "is concerned with this type of employee's access to confidential, political infor-

mation transmitted to the policymaker, which requires political loyalty." *Peterson*, 777 F.3d at 349 (citation omitted); *see also Soderstrum v. Town of Grand Isle*, 925 F.2d 135, 140 (5th Cir. 1991) (Chief of Police's secretary was a "confidential" employee such that her termination did not violate the First Amendment because she "served in a position of confidence requiring complete loyalty to the police chief . . . did his typing and filing, and was privy to certain confidential files and documents."); *Balogh v. Charron*, 855 F.2d 356, 356 (6th Cir. 1988) (bailiff to judge was a "confidential" employee because he "handle[d] sensitive communications for the judge . . . about cases of a confidential matter, information which is not public information.").

The record evidence on appeal demonstrates Heffernan fell into this category, such that even if an actual rather than a perceived First Amendment violation was at issue, the adverse employment action taken against him would not have violated the First Amendment.

Indeed, Chief of Police James Wittig testified that the "average patrolman" could go out and engage in political activity, but that Heffernan was "held to a higher standard" because he worked in the Chief's Office. *Heffernan v. City of Paterson*, No. 14-1610 (3d Cir.), Joint App., A-

0636-0637. He was one of four officers in the Chief's Office. *Id.*, A-0650. The Chief of Police Wittig "hand-picked" Heffernan to work in his office because of the confidential work his office does. *Id.*, A-0691, A-0686.

The Chief of Police also testified that confidential mail came in from citizens to his office and that Heffernan would open and process this confidential mail on occasion. *Id.*, A-0687-688. Heffernan also had access to the confidential files, including personnel records of officers, confidential letters, communications from the prosecutor's office or attorney general, and access to the computer system. *Id.*, A-0688-0689, A-0693, A-0696. He had access to a security door to get into the Chief's Office, and he sat in the Chief's Outer Office with the Chief's confidential secretary and executive officer, approximately eight feet away from the Chief's private office. *Id.*, A-0691, A-0695-0696, A-0698.

Heffernan also had access to officers' salaries and other confidential information. *Id.*, A-0697. Chief of Police Wittig explained that when it came to the officers assigned to the Chief's Office, "confidentiality in each officer is a must. . . . When I brought Jeffrey down to my office, Chief of Police, I held Jeffrey to a higher standard than any other officer." *Id.*, A-0701. As to why he reassigned Heffernan, the Chief

testified, "He's the first detective that I brought back down into my office after I became chief. I expected more in Jeffrey. Jeffrey disappointed me. He violated my trust. I felt I couldn't trust him no more. If at that point I couldn't trust him, I couldn't have him work in my office. That's why I reassigned him." *Id.*, A-0701-0702.

Although the Courts of Appeals have, at times, regarded the confidential nature of a position as sufficient to place a government employee under the *Elrod-Branti-Rutan* exception, this Court's pronouncement in *Branti* articulated "the ultimate inquiry" not as "whether the label 'policymaker' or confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation [or political allegiance] is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.[6] *Amici*'s position is that a government employer

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[6] At least one lower court has "acknowledged . that 'because Justice Stevens specifically addressed whether an assistant public defender was a 'policymaking' and/or 'confidential' employee, and concluded that the answer to each question was no, there is disagreement in the legal academy about whether the language in *Branti* purporting to substantively reformulate the *Elrod* standard is dicta.'" *Ezell v. Wynn*, 802 F.3d 1217, 1224 n.8 (11th Cir. 2015) (citation omitted).

should be able to require political allegiance from a deeply trusted employee like Heffernan with access to his confidential files, correspondence, and other sensitive materials, because the Chief of Police would be unable to carry out his duties absent assurance that his deputy is entirely loyal and trustworthy. Such a clarification of the *Elrod-Branti-Rutan* exception is sensible and warranted.

In any event, regardless of whether the Court determines that the adverse action taken against Heffernan falls outside the *Elrod-Branti-Rutan* exception, the fact is that that no First-Amendment-protected conduct occurred in this case; there is no "there" there. *See* GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (1937). The Court should resist Petitioner's invitation to contort First Amendment doctrine such that Petitioner can recover for the "deprivation" of a right he never exercised.

CONCLUSION

For the foregoing reasons, and for the reasons contained in Respondents' brief, the decision of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, NEW JERSEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a person can establish a First Amendment claim pursuant to 42 U.S.C. § 1983—a statute that requires the plaintiff to show he suffered a "deprivation" of a constitutional right—when the person admits he did not engage in any First Amendment-protected activity and, thus, did not suffer any deprivation of his First Amendment rights.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the New Jersey State League of Municipalities (the "League"). The League is a nonprofit, unincorporated association created in 1915 pursuant to N.J. Stat. § 40:48-22. For a century, the League has promoted the general welfare of its members through the study and advocacy of legislation affecting local government. The League's executive staff routinely testifies before the New Jersey Legislature on issues ranging from public employment to affordable housing. Also, each month, the League publishes its award-winning magazine, *New Jersey Municipalities*, which provides cutting-edge analysis of proposed federal and state laws, as well as recent news on municipal affairs. Where appropriate, the League institutes legal proceedings to further the interests of its members, and also participates as *amicus curiae* in select cases. As a whole, the League offers counsel, advocacy, and educational programs to more than 13,000 elected and appointed municipal officials in New Jersey, including over 560 mayors.

The League has a keen interest in this case because it significantly impacts the relationship between municipalities and their employees. New Jersey offers robust, comprehensive protections for public employees. These protections allow public employees to challenge

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1. Both parties consented to the filing of this brief by filing blanket written consents with the Clerk of the Court. Pursuant to Rule 37.6, the League states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the League or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

adverse employment decisions, including decisions they believe are motivated by political considerations. As part of their remedies, they may obtain reinstatement, back pay, and even counsel fees, all while minimizing the acrimony and expense that litigation entails. Expanding the First Amendment to protect individuals not engaged in any First Amendment-protected activity, such as Petitioner Jeffrey Heffernan, not only departs from the Court's First Amendment jurisprudence, but also unnecessarily displaces these state law remedies in favor of expensive, taxpayer-funded litigation in the federal courts. The League and its members have a strong interest in avoiding such a result.

SUMMARY OF ARGUMENT

The First Amendment protects an individual's right to engage in "political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976); *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377, 411 (2000)("The Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information." (Thomas, J. dissenting)). This protection reflects the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association[.]" *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). When an individual believes government has run afoul of this protection, he may institute an action pursuant to 42 U.S.C. § 1983. "The terms of § 1983 make plain two elements that are necessary for recovery." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). First, plaintiff must show that "the defendant has deprived him" of a

constitutional right. *Id.* Second, plaintiff must show that "the defendant deprived him of this constitutional right" under color of law. *Id.* This requirement of "deprivation" is rooted in the statute's text. *See* 42 U.S.C. § 1983.

Mr. Heffernan now asks this Court to extend First Amendment protections to those, such as himself, who admittedly do not engage in any First Amendment-protected activity and, thus, were never deprived of any First Amendment right. Mr. Heffernan contends the Third Circuit's approach—which is faithful to both the First Amendment's purpose and § 1983's plain language—invites chaos, leaving public employees without any protection from vindictive employers. Pet'r's Br. 22-29. This contention is without merit.

Mr. Heffernan complains he was "demoted" from detective to patrolman in light of his supervisor's (mis)perception that he supported mayoral candidate Lawrence Spagnola. Pet'r's Br. 2, 4. Had Mr. Heffernan invoked any of his two remedies under the Civil Service Act (CSA), N.J. Stat. §§ 11A:1-1 *et seq.*, we would not be here. The CSA expressly prohibits political retaliation, and provides a procedure by which career service employees in civil service jurisdictions, such as Mr. Heffernan, may challenge any such perceived action. *See* N.J.A.C. § 4A:2-5.1.

If he found that remedy unpalatable, and because he considered his reassignment a "demotion," Mr. Heffernan could have resorted to the CSA's provision concerning demotions. That provision limits the bases upon which civil service employers may discipline classified employees. *See* N.J.A.C. § 4A:2-2.3(a). Unsurprisingly, the list of

acceptable bases does not include political affiliation. Under either provision, Mr. Heffernan could have received reinstatement, any lost wages, and counsel fees. These types of protections and remedies are not limited to civil service jurisdictions. As discussed below, New Jersey's tenure and collective bargaining laws extend similar, if not identical, protections to non-civil service employees.

The only remedy unavailable to Mr. Heffernan was monetary damages for mental anguish, humiliation, and pain and suffering. But that is as it should be. The purpose of damages under § 1983 is to "compensate persons for injuries caused by the deprivation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 254 (1978). The First Amendment right to associate freely is the only one at issue here. And Mr. Heffernan admittedly did not suffer any deprivation of that right—he readily admits he never tried to associate with Mr. Spagnola's campaign. Rather, what Mr. Heffernan lost was a coveted position in the Chief of Police's office. And to compensate for that loss, Mr. Heffernan had available to him state law remedies, which he unfortunately ignored. He now asks the Court to expand the First Amendment's reach to alleviate the consequence of that decision. This Court should decline and accordingly affirm the Third Circuit's decision.

ARGUMENT

I. New Jersey Law Already Provides Sufficient Remedies To Public Employees Complaining Of Political Retaliation.

A. Mr. Heffernan Could Have Used The Civil Service Act To Overturn His Reassignment.

For over 100 years, New Jersey has afforded protections to public employees and shielded them from adverse employment decisions rooted in political influences. In 1908, New Jersey adopted the first iteration of the CSA, which covered classified employees at both the state and local level. *West New York v. Bock*, 186 A.2d 97, 105 (N.J. 1962). The "primary emphasis" was to ensure "appointments to the public service solely on the basis of merit," while reserving the employer's right "to separate employees for disciplinary reasons or because of inefficiency or incompetency." *Id.* Though initially limited in its protective sweep, even in 1908, the CSA "prohibit[ed] removal or demotion for religious or political reasons." *Mason v. Civil Serv. Comm'n*, 238 A.2d 161, 164 (N.J. 1968).

Today, after several employee-friendly revisions, the CSA stands as a monument to New Jersey's commitment to public employees. "[T]he Act seeks to put civil service positions beyond political control, partisanship, and personal favoritism." *Communications Workers v. N.J. Dep't of Pers.*, 711 A.2d 890, 892 (N.J. 1998). The Legislature was unequivocal in this commitment, formally declaring it "the public policy of this State to select and advance employees on the basis of their relative

knowledge, skills and abilities . . . [and] protect career public employees from political coercion[.]"N.J. Stat. § 11A:1-2.

Except for policymakers and certain confidential positions, *see* N.J. Stat. § 11A:3-5 (listing confidential positions), the CSA governs the appointment, promotion, demotion, and discipline of all employees, including police officers, in a civil service jurisdiction. *Walsh v. Dep't of Civil Serv.*, 107 A.2d 722, 724-25 (NJ. Sup. Ct. App. Div. 1985); *Jersey City v. Babula*, 153 A.2d 712 (N.J. Super. Ct. App. Div. 1959). While the CSA does not require municipalities to become civil service jurisdictions, *see* N.J. Stat. § 11A:9-1, more than 380 municipalities and municipal agencies, including the City of Paterson, have opted into the scheme. N.J. Civil Serv. Comm'n, Civil Service Jurisdictions, http://www.nj.gov/csc/about/divisions/slo/jurisdiction.html (last visited December 6, 2015). Once a municipality elects to become a civil service jurisdiction, it accedes to all of the obligations and benefits of the CSA and its implementing regulations. *Headen v. Jersey City Bd. of Educ.*, 55 A.3d 65, 70 (N.J. 2012).

Under the CSA, Mr. Heffernan had available two independent bases by which to challenge his reassignment from detective to patrolman: 1) political retaliation, and 2) disciplinary demotions.

1. The CSA Prohibits Political Retaliation.

The CSA states: "[a]n appointing authority[2] shall not take or threaten to take any action against an employee in the career service . . . based on the employee's permissible political activities or affiliations." N.J.A.C. § 4A:2-5.1(b). If the employee suspects a violation of this rule, he may appeal the adverse employment action to the Civil Service Commission (the "Commission"). N.J.A.C. § 4A:2-5.2(a). After an investigation, the Commission will render a decision, either on the written record or after an appropriate proceeding. N.J.A.C. § 4A:2-5.2(c)-(d). The Commission's review is *de novo. Grasso v. Borough Council of Glassboro*, 500 A.2d 10, 14 (N.J. Super. Ct. App. Div. 1985).

Where the appointing authority has acted improperly, the Commission "shall provide appropriate protections and remedies to the employee." N.J.A.C. § 4A:2-5.2(e). These remedies include reinstatement, *In re Appeal of Lembo*, 376 A.2d 971, 972-73 (N.J. Super. Ct. App. Div. 1977), as well as "back pay, benefits, seniority, and reasonable attorney fees[.]" *Oches v. Twp. of Middletown Police Dep't*, 713 A.2d 993, 994 (N.J. 1998). Any party dissatisfied with the Commission's decision may seek appellate review. *State Farm Mut. Auto. Ins. Co. v. State*, 545 A.2d 823, 839 (N.J. Super. Ct. App. Div. 1988)(citing N.J. Ct. C.P.R. 2:2-3(a)(2) and noting "appeals may be taken as of right to the Appellate Division 'to review final decisions or actions of any state administrative agency or officer.'").

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2. An "appointing authority" is any "person or group of persons having power of appointment or removal," N.J.A.C. § 4A:1-1.3, and includes participating municipalities that opt into the civil service scheme.

Public employees have invoked these protections for decades. *See, e.g., Weaver v. N.J. Dep't of Civil Serv.*, 79 A.2d 305 (N.J. 1951)(challenging removal and alleging political retaliation); *Amodio v. Civil Serv. Comm'n of Dep't of Civil Serv.*, 194 A.2d 512 (N.J. Sup. Ct. App. Div. 1963)(challenging abolishment of position and alleging, *inter alia*, political retaliation); *In re Crowley*, 473 A.2d 90 (N.J. Sup. Ct. App. Div. 1984)(challenging denial of promotion and alleging bias against union activities, which "are encompassed within the category of 'political opinions or affiliations'" and, thus, entitled to protection).

The regulation prohibiting political retaliation, N.J.A.C. § 4A:2-5.1, is devastatingly simple in its thrust. Mr. Heffernan needed only to invoke it. Had he done so, he would have largely obtained what he seeks—reinstatement, return of any lost wages, and even attorney fees. For reasons unexplained, Mr. Heffernan voluntarily abandoned these remedies in favor of a First Amendment claim—even though he admits he engaged in no First Amendment-protected activity. Worse, this is merely one provision of the CSA that Mr. Heffernan chose to ignore.

2. The CSA Permits Demotions Only On The Basis Of Certain Enumerated Acts, And Even Then, The Employer Must Provide Due Process.

Mr. Heffernan insists his reassignment constituted a "demotion." Pet'r's Br., pp. 2, 4, 5, 12, 13, 21, 26. If the Court agrees, then it should also know that Mr. Heffernan had an additional avenue for relief available under the CSA.

Under the CSA, a public employer "may suspend or take other disciplinary action against" a career service employee "only for neglect of duty or other good cause." *Scouler v. City of Camden*, 752 A.2d 828, 830 (N.J. Super. Ct. App. Div. 2000). What constitutes "good cause" for discipline[3] is defined by N.J.A.C. § 4A:2-2.3(a). It permits public employers to impose discipline for, *inter alia*, incompetency, insubordination, excessive absenteeism, misuse of property, violating the anti-discrimination policy, or conviction of a crime. N.J.A.C. § 4A:2-2.3(a). Discipline cannot be imposed where it would intrude upon the employee's First Amendment rights. *See Karins v. Atl.City*, 706 A.2d 706, 713 (N.J. 1998)(recognizing that discipline cannot be imposed where it would violate the First Amendment, but ultimately holding that firefighter's use of a racial slur was not protected by the First Amendment).

Moreover, the CSA mandates that discipline be imposed consistent with due process. This includes notice, N.J.A.C. § 4A:2-2.5(a); a right to a departmental hearing during which the employee may be represented by counsel, N.J.A.C. § 4A:2-2.6(b); a right to review evidence, and present and cross-examine witnesses at the hearing, N.J.A.C. § 4A:2-2.6(c); a right to appeal any adverse decision to the Commission, and convene a *de novo* hearing before an administrative law judge, N.J.A.C. §§ 4A:2-2.8; 4A:2-2.9(b); and the right to seek appellate review of the Commission's final decision. *State Farm Mut. Auto. Ins. Co.*, 545 A.2d at 839; N.J. Ct. C.P.R. 2:2-3(a)(2); N.J. Ct. C.P.R. 2:12-3.

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3. "Discipline" includes not only terminations and suspensions, but also "disciplinary demotions," N.J.A.C. § 4A:2-2.2, which is what Mr. Heffernan claims he suffered.

Where the employer takes disciplinary action, but fails to provide notice or an opportunity for a departmental hearing consistent with the prescribed procedures, the employee may appeal the disciplinary action directly to the Commission and seek a stay. N.J.A.C. § 4A:2-2.5(e). If the employee succeeds on his appeal, the Commission has the power to reinstate the employee, *see In re Appeal of Lembo*, 376 A.2d at 972-73, and award back pay, seniority, restitution of any fine, as well as attorney fees. N.J.A.C. §§ 4A:2-2.10; 4A:2-2.11; 4A:2-2.12.

If Mr. Heffernan sincerely believed his reassignment constituted a demotion, his ability to successfully challenge it appears to be a foregone conclusion under the CSA's discipline provisions. Perceiving, accurately or otherwise, that an employee is engaged in political activity is not a permissible basis for a demotion. *See* N.J.A.C. § 4A:2-2.3(a). Thus, if the reassignment is construed as a demotion, Mr. Heffernan's challenge, had he attempted one, would have likely resulted in his employer quickly reversing course.

Mr. Heffernan also had available the CSA's procedural protections. Mr. Heffernan received his so-called demotion on April 14, 2006, just one day after he was spotted talking to Aslon Goow, Mr. Spagnola's campaign manager. Pet. App. 3a, 16a-17a. It is plain then that he never received notice of any disciplinary charges, a hearing, or any of the other procedural protections guaranteed to him by the CSA. These procedural irregularities would warrant vacatur of the "demotion." *Nicoletta v. North Jersey Dist. Water Supply Com.*, 390 A.2d 90, 99 (N.J. 1978)(vacating dismissal of employee where employer failed to provide adequate notice of the charges). Again, had Mr. Heffernan

succeeded under this provision, he would have been reinstated, reimbursed for any lost wages, and awarded counsel fees. Despite this, he chose to vindicate a First Amendment right which he never exercised and of which he was never deprived.

B. Police Officers In Non-Civil Service Jurisdictions Have Similar Protections Under The Tenure Of Office Act.

Police officers employed in non-civil service jurisdictions are afforded protections similar to their civil service counterparts. Specifically, the Tenure of Office Act, N.J. Stat. § 40A:14-147, limits the bases upon which police officers can be disciplined or removed, and provides protection to those officers not employed in a civil service jurisdiction.[4] N.J. Stat. § 40A:14-147 explicitly states:

> Except as otherwise provided by law, no permanent member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause as hereinbefore provided . . .

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4. The Tenure of Office Act covers police officers in both civil service and non-civil service jurisdictions. However, it is largely duplicative of the protections offered officers under the CSA. *Compare* N.J.A.C. § 4A:2-2.3(a) with N.J. Stat. § 40A:14-147.

"According to the plain language of the statutory scheme . . . a police officer cannot 'be suspended, removed, fined or reduced in rank' without 'just cause.'" *Ruroede v. Borough of Hasbrouck Heights*, 70 A.3d 497, 506 (N.J. 2013) (citing N.J. Stat. § 40A:14-147). The reasons constituting "just cause" are limited to "incapacity, misconduct, or disobedience of [departmental] rules and regulations[.]" N.J. Stat. § 40A:14-147. The statute explicitly states that "[a]n officer cannot be removed 'for political reasons[.]'" *Id.* (citing N.J. Stat. § 40A:14-147). The provision covers county and municipal police officers. *See Perrapato v. Rose*, 199 A.2d 385, 388 (N.J. Super. Ct. App. Div. 1964).

The employer must serve written notice of any charges, and provide a hearing within thirty (30) days. N.J. Stat. § 40A:14-147. "[T]he burden of proving the charges is on the police officer's employer." *Ruroede*, 70 A.3d at 507. The police officer may seek *de novo* review in the New Jersey Superior Court's Law Division. *Id.* (citing N.J. Stat. § 40A:14-150). As with the CSA, appellate review is available consistent with the New Jersey Court Rules. *Id.* The remedies for the police officer are all-encompassing. They include reinstatement, back pay, *id.*, as well as counsel fees. *Oches*, 713 A.2d at 944.

Thus, even police officers in non-civil service jurisdictions enjoy the protections afforded Mr. Heffernan. Similar protections are available to other professions under their respective tenure laws. *See* N.J. Stat. § 18A:28-5 (teachers); N.J. Stat. § 40A:14-19 (firefighters).

C. The Vast Remainder Of New Jersey's Public Employees Have Protections Under Their Respective Collective Negotiation Agreements.

The 1947 New Jersey Constitution provides: "[p]ersons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." N.J. const. art. 1, § 19. This constitutional promise undergirds the Employer-Employee Relations Act (EERA), N.J. Stat. §§ 34:13A-1 *et seq.*

With the exception of "elected officials, members of boards and commissions, managerial executives, or confidential employees," the EERA guarantees public employees the right to "form, join and assist" any union, and to do so "without fear of penalty or reprisal[.]" N.J. Stat. § 34:13A-5.3. It further permits collective bargaining over the "terms and conditions of employment," as well as the "grievance and disciplinary review procedures" afforded employees.[5] *Id.*

"Since New Jersey is a highly unionized state, it was inevitable that public employees in massive numbers would seize upon the opportunity to organize and engage in the collective negotiations process." STATE OF N.J. PUBLIC EMPLOYEE RELATIONS COMMISSION, PERC

5. Civil service employees, and employees covered under the tenure laws, may also collectively negotiate. However, they may not negotiate away the CSA or tenure law provisions concerning grievance and disciplinary procedures, except for in cases involving minor discipline (*i.e.*, suspensions of five days or fewer). N.J. Stat. § 34:13A-5.3.

AFTER 40 YEARS 1 (2008), http://www.state.nj.us/perc/PERC_after_40_Years.pdf. This explosion has resulted in New Jersey obtaining the sixth-highest percentage of government sector union members. Barry T. Hirsch, et al., *Union Density Estimates by State, 1964-2014*, UNION MEMBERSHIP AND COVERAGE DATABASE, HTTP://UNIONSTATS.GSU.EDU/MONTHLYLABORREVIEWARTICLE.HTM (last visited on December 11, 2015). In fact, the League is not aware of any county or municipality whose employees have opted to forego collective negotiations.

Collective negotiations agreements (CNAs) provide protections similar to, if not greater than, those provided by the CSA. For example, during the relevant period, Mr. Heffernan was covered under a standard CNA between his union and employer. City of Paterson and Paterson Police PBA Local 1, August 1, 2003-July 31, 2008, HTTP://WWW.PERC.STATE.NJ.US/PUBLICSECTORCONTRACTS.NSF (last visited on December 11, 2015). The CNA permits the City of Paterson to discipline or remove police officers only for just cause. *Id.* at 6. In addition, it expressly permits police officers to engage in political activities, including joining political organizations, making political contributions, and even running for elected office. *Id.* at 12. Grievance and arbitration procedures are also set forth. *Id.* at 16-21.[6]

These CNA protections and procedures are commonplace, and can be utilized by those public sector employees employed by non-civil service jurisdictions and for whom no tenure laws are applicable.

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6. Because the City of Paterson is a civil service jurisdiction, the CSA's disciplinary procedures would supersede these provisions. *County of Monmouth v. Communications Workers of America*, 692 A.2d 990, 999 (N.J. Super. Ct. App. Div. 1997).

D. Affirming The Third Circuit's Holding Does Not Signal A War On Public Employees.

Mr. Heffernan's warning of a coming apocalypse if the Court affirms the Third Circuit's ruling rings untrue. Pet'r's Br. 22-29. Mr. Heffernan asserts "[t]he jokes employees tell at work, the hobbies they pursue, the kinds of music they listen to—all are fodder for dismissal by a politically motivated boss, if the Third Circuit is correct that the First Amendment offers no protection." *Id.* at 26. But this is simply not true in New Jersey. As noted, the CSA, the tenure laws, and the CNAs, already offer non-confidential public employees the same protections that Mr. Heffernan asks for here—that is, to be secure in their jobs from retaliation based on political activity, irrespective of whether the activity actually occurred.[7] There is no need to extend First Amendment protections to those who do not engage in any First Amendment-protected activity. Nor is there a need to allow individuals to bring § 1983 claims where they admittedly did not suffer any "deprivation."

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7. In the event a constitutional remedy is a must, it would seem the Fourteenth Amendment's Due Process Clause would be the appropriate vehicle. *See Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988)("When [government] decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.").

CONCLUSION

The judgment of the Third Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,
Petitioner,

v.

CITY OF PATERSON, NEW JERSEY, ET AL.
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, THE MARION B. BRECHNER FIRST AMENDMENT PROJECT, AND THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amici curiae* briefs in this and other federal courts, and in state courts around the country.

The Marion B. Brechner First Amendment Project is a nonprofit, nonpartisan organization located at the University of Florida in Gainesville, Florida. Directed by Prof. Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current cases and controversies affecting freedom of speech, freedom of press, freedom of petition, and freedom of thought.

The Pennsylvania Center for the First Amendment is a leading national research center about the First Amendment housed in the College of Communications at Penn State. For more than 20 years, the Pennsylvania Center for the First Amendment has

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici Curiae* represents that it entirely authored this brief and no party, its counsel, or any other entity but *Amici* and their counsel made a monetary contribution to fund the brief's preparation or submission. Written consent of the parties have been filed with the Clerk of this Court.

been a leader in education, research and outreach concerning the fundamental rights of free expression and free press in the United States. Founded in 1992, the Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

SUMMARY OF ARGUMENT

Three aspects of this case are undisputed. First, as a police officer, Petitioner Jeffrey Heffernan was a government employee for whom political affiliation was not an appropriate requirement for the effective performance of his public duties. Second, the First Amendment prohibits government employers from taking adverse employment actions against such non-political employees that are motivated by political or partisan affiliation or association. Third, Respondents' demotion of Heffernan was motivated solely by their belief that Heffernan supported a political candidate who was running against the incumbent mayor. Accordingly, Respondents violated Heffernan's First Amendment right of association under color of state law and 42 U.S.C. § 1983 gives him a cause of action to seek relief for the injuries caused by that violation. The Third Circuit's holding that he does not have a claim because his employer's unconstitutional action was taken based on a mistaken assumption is unduly restrictive of the First Amendment associa-

tional rights of public employees and will lead to arbitrary undercompensation of victims, underdeterrence of constitutional violations and chilling of protected First Amendment activity.

ARGUMENT

I. Nonpolitical Government Employees Have a First Amendment Right Not to Suffer Politically Motivated Adverse Employment Consequences

It is a cornerstone of this Court's First Amendment jurisprudence that protection of the freedom of speech necessarily encompasses the protection of "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (internal quotation marks omitted); *see also NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

The Court has also recognized that the millions of men and women who work at all levels of government do not sign away their First Amendment right

to free association when they become public employees. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) ("[A] citizen who works for the government is nonetheless a citizen."); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996) ("A State may not condition public employment on an employee's exercise of his or her First Amendment rights."); *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government.").

While the government may have a legitimate interest in the political affiliation of certain employees with policy-making responsibilities, for government employees such as police officers, firefighters and teachers, political affiliation is not "an appropriate requirement for the effective performance of the public office involved." *See Branti v. Finkel*, 445 U.S. 507, 517 (1980). The First Amendment gives such employees the right to support whichever candidates and parties they choose without the fear of being fired or demoted because of the political motivations of their superiors. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990) ("[P]romotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees."). This important First Amendment principle protects nonpolitical employees from suffering adverse employment consequences on account of their political beliefs and prevents govern-

ment employers from "wielding [their] powers to interfere with [their] employees' freedom to believe and associate, or to not believe and not associate." *See id.* at 76.

II. Heffernan Suffered the Precise Type of Harm that § 1983 First Amendment Retaliation Claims are Designed to Remedy, Caused by the Precise Type of Politically Motivated Employment Action that § 1983 Seeks to Deter

This Court has long recognized that the dual purposes of 42 U.S.C. § 1983 are to compensate persons for injuries caused by constitutional violations committed under color of state law and to deter future abuses of power. *See Carey v. Piphus*, 435 U.S. 247, 254 (1978); *see also Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("the purpose of § 1983 is to deter state actors from using their badge of authority to deprive individuals of their federally guaranteed rights and to provide compensation if such deterrence fails."); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) ("To deny compensation to the victim would therefore be contrary to the purpose of § 1983."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) ("the deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983."); *Owen v. City of Independence Mo.*, 445 U.S. 622, 651 (1980) ("§ 1983 was intended not only to provide compensation to the victims of past abuses, but

to serve as a deterrent against future constitutional deprivations, as well.").

As a Paterson City police officer, Heffernan had a First Amendment right not to be demoted because of the political or partisan motivations of his superiors. *See Branti*, 445 U.S. at 519 ("[C]ontinued [government employment] cannot properly be conditioned upon his allegiance to the political party in control of the . . . government."). Respondents nonetheless summarily demoted him from detective to a walking position because they believed that he supported a candidate seeking to unseat the incumbent mayor in an upcoming election. The fact that Respondents' beliefs about Heffernan's political associations may have ultimately been incorrect does not change the nature of the factual and legal harm that Heffernan suffered. As such, Heffernan should be allowed to proceed with his § 1983 claim, based not on the soundness of his employers' factual assumption, but on their motivation alone. *See Rutan* 497 U.S. at 75; *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008) ("[O]ur only relevant consideration is the *impetus* for the elected official's employment decision vis-a-vis the plaintiff.") (emphasis added).

A government employer who fires or demotes a nonpolitical employee on the basis of a perceived political affiliation acts contrary to the First Amendment whether that perception is correct or not. For example, an employer who has reason to believe that her employee supports a political adversary might be

tempted to retaliate. The employer could do so swiftly without learning more facts or making a concerted effort to be 100 percent sure that the employee is playing for the opposing team. The Third Circuit's rule ignores the common underlying motivation of these two employers, shielding the former from liability under § 1983 so long as her hasty assumptions prove to be incorrect. This runs contrary to the spirit of First Amendment retaliation claims, which seek to deter government officers from indulging in the temptation to let political motivations affect employment decisions.

The First Amendment protects Heffernan's right not to have the course of his career as a police officer determined by the political motivations of his supervisors. *See Branti*, 445 U.S. at 519. Third Circuit precedent cannot change the fact that Heffernan has suffered the exact kind of harm caused by the exact kind of unconstitutional action by the exact kind of defendants that § 1983 exists to address.

III. The Third Circuit's Rule Will Lead to Arbitrary Undercompensation of Victims, Underdeterrence of Abuses and the Chilling of Protected First Amendment Activities

The Third Circuit's refusal to accept perceived association as a cognizable basis of a § 1983 retaliation claim arbitrarily leaves victims undercompensated and government employers underdeterred. The Sixth

Circuit's approach, however, avoids these undesirable consequences by making "the critical inquiry" of such cases "the motivation of the employer." *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 299 (6th Cir. 2012). The district court in this case, even as it rejected Heffernan's claim, acknowledged the tenuous reasoning underpinning the Third Circuit's precedents:

> There is a certain logic to *Dye*. Assume that State Employer A retaliates because Employee is a Democrat, or a Republican. Obviously there is a First Amendment freedom of association claim to be made. If State Employer B does the same thing, with the same unconstitutional retaliatory motive, *and is wrong to boot*, should it really be placed in a *more* favorable position?

Pet. App. 51a-52a. (emphasis in original). The district court correctly recognized that the Third Circuit's approach artificially insulates Employer B from liability even though her actions were no less unconstitutional than those of Employer A. Just as importantly, the victim of B's retaliation has suffered the same harm as the victim of A's retaliation, yet one can recover while the other cannot.

Similarly, one could easily imagine a county clerk, hostile to the political movement supporting gay rights, who sees two office employees on a street

where a LGBT Pride parade is going by. The clerk assumes both employees are affiliated with Pride and fires them for that reason. It turns out that while Employee X is indeed a supporter of Pride, Employee Y just happened to be walking down the street, unaware that a parade was happening that day. The Third Circuit's rule would allow X but not Y to bring a First Amendment retaliation claim even though they were both fired for the same unconstitutional reason. This rule makes no logical sense. Section 1983 First Amendment retaliation claims should focus on the employer's motivations for employment decisions and provide a remedy for employees fired or demoted for impermissible reasons. *See Dye*, 702 F.3d at 299.

One of the key reasons for protecting freedom of association is "preserving political and cultural diversity and . . . shielding dissident expression from suppression by the majority." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). In extending First Amendment protections to government employees, this Court sought to prevent the government from doing indirectly what it could not do directly. *See Rutan*, 497 U.S. at 77–78; *Branti*, 445 U.S. 515–16. If public employees know that they can be dismissed or demoted without recourse under § 1983 when their employer makes a factually mistaken assumption about their political beliefs and activities, their natural tendency will be to refrain from engaging in protected expressive activity that might potentially give rise to erroneous assumptions about which parties, candidates, or

issues they support. Employees will also face increased pressure to support the positions held by those in power. *See Elrod v. Burns*, 427 U.S. 347, 359 (1976) (plurality opinion) ("The threat of dismissal for failure to provide support [for the favored political party] unquestionably inhibits protected belief and association.").

Public employees have no control over whether their employers form mistaken perceptions about the employees' political affiliations. Courts must therefore focus on the motivation of the employer in these types of cases in order to protect the right of nonpolitical government employees to do their jobs free of politically motivated retaliation.

IV. Recognizing Appellee's Cause of Action Will Vindicate Important Constitutional Rights without Adding any Uncertainty to the Law

It is clearly established that politically motivated firings and demotions of nonpolitical employees violate the First Amendment. *See Elrod*, 427 U.S. at 372-73 (plurality opinion) (holding that the First Amendment prohibits a county sheriff from firing office employees because they were not Democrats); *Branti*, 445 U.S. at 519 (holding that a public defender could not fire assistant public defenders because they were Republicans); *Rutan*, 497 U.S. at 75 (extending

the prohibition on politically-based employment decisions to promotions, transfers and layoff recalls of nonpolitical employees); *O'Hare Truck*, 518 U.S. at 717 ("Government officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question.").

Furthermore, the circuit courts of appeal all recognize that § 1983 gives rise to First Amendment retaliation claims against government officers who engage in such decisions. *See, e.g.*, *Hunt v. City of Orange*, 672 F.3d 606, 611 (9th Cir. 2012); *Moss v. Martin*, 614 F.3d 707, 710 (7th Cir. 2010); *Velez-Rivera v. Agosto-Alicea*, 437 F.3d 145, 152 (1st Cir. 2006); *Goodman v. Pennsylvania Tpk. Comm'n*, 293 F.3d 655, 663-64 (3d Cir. 2002). Accordingly, government officers already know what they are not supposed to do when making employment decisions regarding nonpolitical employees.[2] Holding all public employers, including those who act on factually incorrect perceptions, accountable for politically-based firings and demotions will achieve optimal compensation and deterrence without any new uncertainty or complications in the law.

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[2] It is illustrative of this point that in this case Respondents never attempted to assert a defense of qualified immunity because it was clearly established law that they could not have demoted Heffernan in retaliation for supporting Spagnola if they had been right in assuming that Heffernan was in fact supporting Spagnola. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Third Circuit acknowledged that Heffernan clearly established two elements of a First Amendment retaliation claim: that he was a nonpolitical appointee under the standard established in *Branti* and that his political affiliation was a substantial or motivating factor in the adverse employment decision. *See* Pet. App. at 10a. In many cases where an employee alleges that she was fired or demoted for an improper reason, the likely first response of the employer will be to point to legitimate reasons for the action. The employee always bears the burden of making a *prima facie* showing of improper motive. While there also may be a dispute about the first element, there is also a substantial class of employees who are clearly nonpolitical, such as police officers, firefighters, school teachers and lower-level clerical staff. The employee/plaintiff still bears the burden of proving these elements. What the employee should not have to prove is whether her employer was factually right or wrong about the employee's political activities, because the First Amendment compels courts to focus on the reason for the employment decision, not the soundness or accuracy of the reasoning.[3] *Dye*, 702 F.3d at 299–300.

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[3] *Amici* recognize that the question of whether the Third Circuit erred as a matter of law when it found that there was no dispute of material fact as to whether Heffernan actually associated with Spagnola is not before the Court. *See* Pet. App. at 10a–11a. However, if this Court recognizes, as the Sixth Circuit has, that a nonpolitical government employee states a First Amendment retaliation claim when she establishes that her employer's perception of her political affiliation was a substantial or motivating factor in her adverse employment action, the soundness of such claims will no longer depend on complicated factual inquiries of

The § 1983 claim of a nonpolitical government employee who is fired or demoted for an unconstitutional reason should not depend on whether her employer made sure of the employee's political leanings before he acted unconstitutionally.

The Third and Sixth Circuits have reached opposite conclusions about whether nonpolitical public employees who suffer politically motivated firings and demotions lose their standing to bring a § 1983 retaliation claim when their employers acted on a mistaken perception. The Sixth Circuit's approach sensibly allows all employees who are harmed by employment decisions made for impermissible reasons to bring a § 1983 claim against the employers who acted unconstitutionally. The Third Circuit's rule arbitrarily shields wrongdoers from liability and leaves victims without a remedy. This ultimately undermines the First Amendment rights of millions of Americans, chills protected activity and encourages conformity.

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whether the plaintiff produced enough evidence of actual affiliation or association.

CONCLUSION

For the foregoing reasons *Amici* respectfully ask the Court to reverse the judgment of the Third Circuit and remand the case for trial.

Respectfully submitted,

/s/ J. Joshua Wheeler

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